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Notes of J. Reeves' Lectures

Of Law

Def. 1st. Law in its most extensive sense may be defined to be a Rule of Action—

2d. The Law of Nations is a Rule of conduct founded upon the Law of Nature, & adopted by Nations for the purpose of facilitating their mutual intercourse—

3d. Municipal Law is a rule of civil conduct prescribed by the Supreme Power in the State commanding what is right & prohibiting what is wrong—

The Municipal Law of England may be divided into Lex scripta & Lex non scripta—

The Lex non scripta comprehends not only the general customs of the realm, or Common Law but also the particular Customs or usages which are established in particular Districts & Courts—

The Lex Scripta is composed of the Statutes enacted by the Legislature—

Common Law is said to be the immemorial usage of a People, or that which has been practised so long that the memory of Man runneth not to the contrary

This definition however is far from giving a just & correct idea of the subject &c.

for to prevent confusion & dispute, the limit of legal memory is fixed at the accession of Rich. 1st, consequently if this be made the criterion of determining whether a Custom be Law or no, viz. whether it existed antecedently to the reign of Rich. 1st it will follow that by far the greatest part of what is now recieved as Law in Eng. must be rejected, because nine tenths of it never was in existance untill since the accession of that prince — This idea also excludes every possibility of improvement; for if nothing can be admitted as law except what was established previously to the time of legal memory, then it will follow that the present & all future generations must be forever bound down by the scanty & often absurd provisions of unlettered ancestors; unless by the intervention of Statutes which are but a very inadequate remedy for the almost infinite variety of difficulties which dayly arise from a change of circumstances & the improvement of personal rights or of property. The preceding definition is not only defective as applicable to the present period & to this Country, but is false in fact as applicable to the past — For if to constitute a legal custom it is necessary that it be immemorial no law could ever have existed, for there never was a Custom which was at all times ancient & beyond the memory of man —

Every custom being the creature of Society must have been coeval with some stage of it, & therefore would have been destitute of that quality of antiquity which the elementary writers hold to be essential to the constitution of a legal Custom, or common Law —

The true source of the Common Law is the adjudications of the Courts of justice; & the fact is, that in many & even in most cases the Courts make the rules of Common Law — This however is not consonant to the common apprehension of mankind, which is, that the Courts never make law, but only declare what it is — this notion indeed is correct, as applicable to a preexistent usage; for if the enquiry be whether a rule which has previously obtained, be a legal one, then the adjudication of the Court upon the subject, is only declaratory of what the law is upon the point — But in new cases which continually arise, & in principles which are daily discussed, when ~~the~~ Courts are called on to decide what the Law is, they do by their declaration of what the Law is, to all intents make the Law; there being no antecedent rule about it — It is true the Courts in making such novel determinations are, or ought

to be, guided by reason & natural justice. but still the Rule as first laid down by them owes its existence as a Rule of Common Law, to their adjudications - These principles being admitted it will be a reasonable consequence that the Courts of Law have power to alter & vary the system of the Common Law, as well as to add to it, as the reason & exigencies of things may require; for if a custom may become law # without being immemorial, it is now too late to introduce new Customs: & if the Supreme Court in a Country has power to make a law, that same Court must have power to alter or abrogate it; it requiring, ordinarily speaking, no greater power to abolish a usage than it does to establish it - The foregoing powers, the Eng. Courts have exercised in innumerable instances. & the only objection against it is, that it renders the Common Law too fluctuating & uncertain. This tho' an objection of weight is more than counterbalanced by the disadvantages of being confined to old customs only, which from their paucity. & often their absurdity would be extremely inconvenient if unchangable; & also by the advantages which may be expected from those improvements of which the Science of Law is as susceptible as any other -

Of Common Law –

If the Eng. Courts can add to & vary the Common Law as circumstances may require, it should seem that the Courts of this State should have equal authority in that respect – If the position laid down by the Eng. writers on Law be maintainable, towit. that nothing can be recieved as common Law, but immemorial usage; & the accession of Rich^d first, be fixed as the period ~~of~~ by which to decide what customs are of that description, then it will follow that nothing with us can be considered as Law, but what has existed as such, from that remote period; this we know is not the fact – Have we, i.e. our Courts the right to alter the Common Law as it now stands? – the Eng. Courts do constantly, tho very gradually alter it, & there are much stronger reasons for our Courts so doing; because added to the reasons of convenience & expedience which actuate those Courts, are the considerations suggested by the different genius of our government, & manners & habits of our people – further, we are an independent people & it is quite too degrading for such a people to be shackeled with the customs of those with whom they have no connection, & to look up to them for every improvement in jurisprudence –

Of Common Law

The common Law of Eng. ought undoubt-edly to be considered as prima facie evidence of what ~~the Law~~ is right, but may be rejec-ted by our Courts; if upon examination it be found to be opposed to our principles of government, or to the furtherance of justice yet, inasmuch as our law is derived from the ~~Law~~ of Eng. wholly, without the intermix-ture of rules drawn from the Codes of other nations; the common Law of Eng. ought to be considered as our common law, untill otherwise determined by competent authority And in some cases the Common Law of England is absolute in this Country & cannot be altered by our Courts: they are such as arise from the Stat. law of this Country's tacitly adopt-ing parts of the common Law of Eng. as when a Stat. gives a remedy for an injury without defining the offence, in which cases our Courts are bound to have recourse to the Common Law of Eng. to find out what constitutes the offence which the Stat. was designed to guard against; & when it is discovered what that law is, it is to all intents our law, & can be altered only by act of the Legislature — & the Eng. Statutes may in like manner be adopted —

Of Statute Law

The Statutes passed by the Parliament anterior to the emigration to this country, are here in point of obligation, considered upon the same footing as the Eng. common law; but those pass'd since the emigration (unless under certain circumstances) are of no force in this Country— The reason of this is that the Americans had legislatures of their own who enacted such laws as they had need of— Connecticut is however in part an exception to the foregoing general observation; for in this State no British Stat. made subsequent to some period [the exact time is not pointed out] in the reign of Henry the 8th are considered to be Law, tho' this period some time preceded the emigration— There are, however, some late Statutes which are binding in this Country, viz. such as are merely declaratory of what the Com. Law is— such also as we have copied together with the construction which they have received from the Eng. Courts, & the reason is that we have adopted the construction with the Statutes—

The common law furnishes remedies for many cases that are taken notice of by Statute, & for great numbers which are not, as Assumpsits of all kinds, & generally all actions arising out of parol agreements—

Of Statutes

Plow. 206. 11 Co. 61. Hob. 298. 1 Sid. 56 Hard. 18-

Statutes are passed to strengthen & generally to enlarge the common law remedy. & in such cases the Common law & Statutes have concurrent force & authority, & it is optional with the suitor which remedy to persue, unless where there are express negative words in the Stat. taking away the common law remedy-

In a suit brought to recover upon a Statute the declaration is substantialy the same as if brought to recover for the same injury at common law, the Pltff only specifying that he founds himself upon the Statute, & failure of Statute proof will not debar him in such case from his right to recover ~~as~~ as at Common Law in the same suit: for where the Pltff has a good claim at common law, the Court will not subject him to the inconvenience of beginning de novo, merely because he has failed to substantiate his right of recovery according to the rules prescribed by the Statute- But where there is no common law liability, & the Statute creates one, then the Statute mode must be strictly followed & the least failure will be fatal-

Wherever a Stat. commands or forbids any thing without annexing any penalty to the breach of it the common law penalty comes in aid of the Stat. & supplies its deficiency-

But when a prosecution is instituted at common law the Stat. punishment can never be inflic-ted — & in all cases where the Stat. has annexed a milder punishment to the offence than the common law enjoins, the Stat. remedy must be followed although the common law remedy be not expressly taken away —

It has been a question whether in any case punishments ought to be inflicted which are prescribed by an ex post facto Stat.: & it has been held that a distinction obtains between those offences which are merely mala prohibita, & those which are mala in se, the latter being punishable by such Statutes, while the former are not — & this distinction & rule holds good in cases where there has been a preexis-tent Stat. taking cognizance of the offence, as where an offence has been committed during the life of the former stat. but not prosecuted till after its repeal & the substitution of a new one, then the offence which was malum in se would be punishable under the new Statute, the former being dead; but the offence which was merely malum prohibitum would go unpunished being now out of the reach of both Statutes —

Of Statutes

It is a general rule that Statutes are to be in force from the time of their publication; but the time of publication is different in different Countries — In England the Parliament date all their Statutes from the first day of the session & consider them as published on that day. In many of the American States the legal time of publication is the rising of the Legislature, but in Connecticut there is no certain time fixed, tho thus far it is established that they shall not be considered as published until after the rising of the Legislature — When the Statutes are published in the Newspapers or distributed by the Sheriffs, is probably the time of legal publication —

The repeal of a repealing Statute, is a revival of the former one without any thing more done —

Penal Statutes are to be construed strictly according to the letter, except where the innocent are endangered by such construction, in which case the spirit and not the letter is to be followed —

But remedial Statutes are to be construed liberally for both parties & according to their true intent — for example — in a suit for damages for a fraud, the Stat. will be construed liberally & beneficially for the Plff, but upon an indictment, for the same fraud the Stat. must be strictly construed

Statutes which treat of things or persons of an inferior rank cannot by any general words be extended to those of a superior —

Of Statutes

A saving clause totally repugnant to the body of an act is void— When common & Statute law differ the former gives way to the latter & an old Statute to a newer one—

8: Co. 118 Hob. 87 Statutes made contrary to reason are by many decisions of the English Courts, declared void— Blackstone however qualifies this rule. vol. 1st: 91— & it is difficult to reconcile this power of Courts with the maxim that the legislative is paramount the judicial power— Statutes however which en-join impossibilities are ~~[illegible]~~ in their own nature void; & so are those which are repugnant to the Constitution which is paramount all Stat-utes, & of this the Courts of Law are the proper judges—

It has been a generally received opinion that, when a Stat. is enacted which makes any thing unlawful

Salk. 198 Id. which had been by anterior Covenant between parties, stipulated to be done, such Covenantor would by force of the Stat. be released from his cove-nant— but this doctrine is contradicted by a case in Wilsons Reports; & it seems to be of small mo-ment to the parties which rule is adopted— for if the Covenant be considered as released by the Stat. by means of rendering the performance unlawful, the Covenantor will be compelled in an action, for money had & rec. to refund to the covenantee the value of the consideration which induced the Covenant— and if the covenant be not conside-

Of Statutes

as repealed in such Stat., still the Covenantee can recover the actual consideration, for an action should not be sustained for the penalty, but only for the actual damages sustained —

Where there is a covenant with a penalty the covenantee is at his election whether to commence a suit upon the penalty or for the damages merely; but if he sues upon the penalty he can recover no more than the penalty let his real damages be ever so great; but it is otherwise if he abandons the penalty & goes for the real damages

Statutes are divided into public & private. A public Statute is one which affects or may affect the whole community —

Private Statutes are such as affect individuals, or particular portions of the community only.

The rule in Eng. is that private Statutes must always be pleaded specially & can never be given in evidence under the general issue, but that a public Stat. need not be pleaded, for the judges are bound to take notice of it whether pleaded or not.

There are however some few exceptions to the latter branch of the rule as 1stly Whenever a written security is attempted to be avoided by some general Statute, that Stat. must be specially pleaded, as in the instance of a usurious contract. for there the Stat. against usury must be specially pleaded — this in written Contracts only —

IIdly When there is a proviso annexed to a Statute which it is necessary for a party to avail himself of - as for example, in an action of Ast. if the Deft would avail himself of the Stat. of Limitations he must plead it, in order that the Pltff may have an opportunity of replying over & shewing that he is himself within the exceptions of the Stat. as an Infant, feme covert &c —

IIIly The Statute of frauds & perjuries if to be taken advantage of must be specially pleaded, & that not because the Legislature have annexed provisos to it, but because the Courts of justice have adjudging that those cases that are not within the danger of the abuse intended to be prevented in the Stat. are not within the real intention of it & therefore the Courts direct the Stat. to be pleaded specially so that the Pltff may have an opportunity by his replication of shewing that the case is not within the meaning of the Statute. But in this State the foregoing rules & exceptions do not obtain, for our Stat. regulating pleadings gives liberty to give in evidence any Stat. whether public or private under the general issue, & also any transaction of the parties, except it be an act of the Pltff releasing the Deft. from his liability as a release, accord & the like which must be plead

Of Statutes

But this mode tho legal is rarely practised here; & when it is this distinction is to be observed. that when a private Statute is to be given in evidence, it must be produced to the Court but a public one need not

When a Statute imposes a duty upon a majistrate or other Officer in the service of the public & uses the word may, it has an imperative signification & is equivalent to must, or shall
Salk. 609 but where any thing is thus mentioned & no duty imposed, may, barely denotes liberty—

When a Statute makes use of a definite expression, that expression or word, is to be taken in exactly the same sense in which it is used at common law— or if one Statute is copied from another the words are to have the same meaning in both—

Where a Stat. inflicts a more severe punishment for the 2d. than for the 1st. offence, it is necessary in order to subject the offender to the increased punishment to shew a record of his former conviction for no other evidence of that fact can be admitted—

If a Statute gives a forfeiture & does not mention to whom, if there be any person particularly agrieved by the offence, the
Co. Lit. 159 forfeiture goes to him or her— otherwise to the public—

Of Statutes

In cases where a Statute gives any person a certain sum in damages for a certain injury, his recompence will be the same whether the injury be offered by one or many jointly; as for example, if the law gives ten pounds to one for being assaulted ~~at~~ in a particular manner, if ever so many join in the assault, he shall have ~~but~~ 10£ only from them all — Otherwise it is if the offence be against the public, for then each offender must suffer the whole penalty annexed by the Stat. to the offence, unless the offence be one & inseperable as where two persons assist in killing the same hare, in which case the offence is one, & the penalty single; the Stat. only requiring such a particular forfeiture for killing a hare —

Cro. E. 480

In an action on an agreement which at common Law was good by parole, but by the intervention of a Statute is required to be in writing, it is not necessary to specify in the declaration that it was in writing; the declaration may be as at common law omitting to state in what manner made, whether in writing or not, & the fact of its being in writing may be shewn in evidence — But perhaps if in such case the declaration shews it to have been by parol it would be demurable — Vide No. 6. page 86

Husband & Wife -

Consequences of marriage to the prop.y of the Wife.

Upon intermarriage the whole personal property of the wife vests either absolutely or sub modo in the husband - All personal chat-

Of chattels personal & choses in action -

tels in possession do immediately upon marriage vest absolutely in the husband & his representatives - but with choses in action the case is in some measure different, for unless the husb. reduce them into possession in his life time they revert to the Wife upon his death & do not go to his Executors. but if reduced into possession in the husb. life time they will on his decease belong to his representatives -

Originally if it happened that the wife died before the husb. had reduced her choses in action into possession he lost all right to them & they went to her legal representatives; this at common law; but by a Stat. passed in the reign of Charles 2d. it was made lawful for the husb. to take out administration to the wife's estate, in case of her dying first, & to appropriate all her choses in action to his own use without liability to account to any one therefor -

N.B. If the husb. die before admn. granted, it ought to be granted to his [illegible] [illegible] 3 Br. on 180.

It is however questionable whether in such case he would not ~~have~~ be liable to the amt. of such choses in action for the debts contracted by the wife before marriage - The Law in the State of New York is the same as by the Stat. of Charles; but whether it is so in Connecticut

is a question depending it is thought, upon this point, whether the Stat. of Car. was in affirmance of the Common Law or not — for if it is not in affirmance of the common law it is not binding in this State as no Statutes are, made posterior to the reign of Hen. 8th; the better opinion is that the Stat. was a positive & not a declaratory one, consequently that the principles of the common law are such as are above supposed, (viz). that such choses in action as remained unreduced to possession, ~~& the Wife~~, went for the benefit of the Wife's relation, & not for the benefit merely of the Administrator, whether husb. or other - & if this be a correct opinion the inference is that such is now our Law, neither Statute nor decision of court having adopted the principles of the Stat. of Charles in terms—

In the early periods of the Eng. government it seems that the personal property of the deceased was of very little advantage to the surviving relatives; for altho it was a generally received opinion & maxim, that one third part of the intestate's property of a personal nature called the rationabilis pars, should be given to the Wife surviving, another rationabilis pars to the Children, & the 3.d rationabilis pars it does not

appear had any determinate destination but was probably designed to pay debts & to be expended if, any residue left, in pious uses. In the king as parens patriae, was anciently vested the power of distributing those seve-ral before mentioned portions of the deceased's Estate; & the king devolved the business upon the Bishops, who being accountable to nobody did as they pleased - The consequence was that the Widow was defrauded of her ~~dower~~ portion, the Children of theirs, the debts were unpaid, & the whole property so entrusted, was appropriated by those rapacious Churchmen to themselves, & for the benefit of the Church - At length in the 13th of Ed. 1st a Stat. was passed compelling the Ordinary to pay the debts of the deceased out of the 3d rationabilis pars - & in the 31st year of the reign of Ed. 3d a Stat. was made directing the Ordinary to appoint an Adm.n who should be of kin to the intestate, & by the 21st of Hen. 8th the Ordinary is directed to appoint the Wife, or next of kin, or both - But still the Adm.n after having paid the debts was not obli-ged to distribute the residue to the other re-lations; untill a Stat. was passed in the reign of Car. 2d requiring the Adm.n to distribute the estate to the next of kin - Two years after this last mentioned Stat. the one was enacted

enabling the husb. in quality of Administrator to the wife to appropriate to himself her personal property, which could consist of nothing but choses in action, instead of distributing them to the next of kin; & thus by this 2d. Stat. the former usage was in this one particular revived — But it is to be remarked that, that usage tho' of long continuance was never acknowledged to be law, but a practice in violation of it; & hence it was said that the former Stat. mentioned, were in affirmance of the common law, but that the last was a mere positive Stat., or at best but in part affirmance of a former illegal practice — This conclusion of what the common law upon the subject was, tho perhaps not uncontrovertable, is undoubtedly entitled to much consideration: & if it be correct it will follow that in this State the husb. when administring upon the Estate of the wife, holds the choses in action as a trustee for the next of kin

Of chattels real.

Another species of personal property affected by marriage is chattels real, such as Leases, Mortgages &c as to these the Eng. law differs from what it is in either of the two former kinds of personal estate for if the husb. dies before the wife the Chattel reverts to the wife, but if the wife dies before the husb., the husband keeps it, & that in both

Husband & Wife

N.B. Chattels real which are merely in action in which the Husb. might be sued, not those partly in possession & partly in action as if there be a Rent charge falling due during coverture, it survives, & may be sued or after the Wife's death. But if it became due before marriage it must be sued for in the lifetime of the Wife or it will go to her Admr. & not survive — 3 Bl. 351 — & yet perhaps by administering the Husb. would have it

cases by a kind of survivorship, they being in some respects in the situation of joint tenants. But the doctrine of joint tenancy, or rather of survivorship, having been by adjudication of Court overthrown in Connecticut, it may well be doubted whether Chattels real in this State ought not to follow the same rules with choses in action, for we having no joint tenancies here properly speaking, they cannot go to the survivor by the jus accrescendi, which seems to be the case in England—

Chattels real are liable for the debts of the husb., & may be disposed of by him in his lifetime without the concurrence of the wife, & that too for any length of time, & to commence at any period tho' it be after the death of the Wife.

But he cannot dispose of them by Will, for that cannot take effect in his lifetime & of course the jus accrescendi will prevail — 1 Williams Vernon 476 —

Consequences of marriage to the real estate of the Wife

The real property of the Wife does not vest in the ~~Wife~~ husb. by marriage any further than to give him the use of it during her life— And so long are the uses & profits of the real estate of the wife liable for the debts of the husb., & no longer— Neither can the husb. dispose of the real estate of the wife for any longer period than his own life, except by fine or common recovery in which she must join— And should the husb. grant such estate in fee, the grant would

operate only as a lease for the life of the Wife –

Curtesy. Upon the death of the Wife leaving real property the heir is entitled to the estate subject to certain encumbrances, as Curtesy –

Curtesy by the laws of England is where a man marries a woman possessed of an inheritable ~~estate~~ freehold, as fee simple or fee tail & has issue by her born alive, who could by possibility inherit the estate; then in case of the death of the wife the husb. will be entitled to the tenancy by the Curtesy of such property, whether the issue survive the Wife or not, & that for the term of his natural life – The law in this State rest-ing, however, upon a single decision of Court, differs from the Eng. law in this one particular viz. if the Wife leave a lineal heir, the husb. holds the estate by curtesy only untill such heir comes of full age, otherwise for life as in England

N.B. – This decision has never been recognized as law – & of course the English Law has never been altered in regard to the rights of the tenant by curtesy in Conn.

Of the Wife's int. in the husb.'s estate. At common Law it seems that the Wife was so absolutely entitled to her rationabili parte or one third part of her husb.'s personal prop.y at his death, that he could not even by will deprive her of it – This is now by Statute done away, & the husb. can by will dispose of his whole personal property to the prejudice of the widow children & any body else except creditors –

But if the husband die intestate the Wife is entitled

Husband & Wife

to one third part of the residue of the whole perso-
-nal estate after the debts are discharged, & if
there be no children of the husband, to one moiety, & this in
both cases absolutely & forever - this regulation
is by virtue of the Stat. of Car. 2d. in England; &
in Connecticut by virtue of our Stat. upon the subject

Dower. In Eng. the wife is entitled to her Dower i.e. to
one third part of all the real estate of which her
husb. was seized during her covertime, & of such
as at the time of his death he had a legal title
to, tho' not in possession, provided the estate be
such as by any possibility her issue might
have been heirs to it - Estate in dower
is a life estate only, for which period it is
absolute, & is liable for no debts of the husb.
untill after the death of the doweress - neither
can the husb. defeat the wife of her right to
dower by Devise, or any mode of conveyance
except by fine, or common recovery -
In this State the wife's right to dower
is some what different, for here the wife
is entitled to dower only in such lands as
the husb. dies seized of - But nothing short of
bona fide sales will defeat the right of dower
Deeds of gift to Children or others, or even sales
for a valuable consideration if done for the
purpose of defrauding the wife of her dower (the

Quere — purchaser being privy to the fraud) will be holden of no force against her claim, but be considered as mere legacies & of course not sufficient to bar dower —

Obligations of Children to support Parents &c — Lineal relatives to the degree of grandfathers ascending, & to that of grandsons descending are by law bound to support their poor relatives, but no collaterals are obliged to maintain them, but they shall come either upon the parish or town — But by the laws of Connecticut & Massachusetts, if the wife spends her dower, & becomes a pauper having no lineal relatives to support her, she shall be supported by her husb.'s legatees to the full amount of their legacies —

Jointure — The method of barring dower is by jointure, & in order absolutely to bar dower the jointure must be made before marriage, it must be of a real estate of freehold & such as will afford a competent living suitable to the rank of the wife, otherwise the widow may relinquish, & claim her dower — but the Court must be the judges of what is a competency sufficient to bar the widow of her dower — As to jointures made after marriage, the wife is in all cases at her election either to abide by her jointure or take her dower; but one must always be relinquished. In Connecticut Dower of personal Estate is allowed by Stat.

N.B. - It has been decided in Court that a jointure must be of real Estate.

[This seems in some measure a recognition of the idea that the wife can hold personal prop^ty separate from her husb. during coverture] -

Of the same nature was one species of the old common law dower viz. that made ad ostium ecclesiae, which admitted of personal Chattels being given as a bar against any future claim of dower - thus, in this case the wife was permitted to hold personal prop^ty during the coverture, & even to dispose of it by will -

That the holding of personal property is not repugnant to a State of Coverture, (tho' it is to the principles of Law with few exceptions) is apparent from the custom of London, where it is, & always was permitted to a feme covert to trade seperately from her husband, & he is not liable for the debts which she contracts in such seperate trade - So also it has been in later times determined that seperate maintenance specifically settled upon the wife, it being competent to her support, she living seperately from her husb. puts her in the place of a feme sole & subjects her to the same liabilities - this was decided in the case of Corbet vs Poelnets - So too a wife may obtain property by means of presents, if given to her sole & seperate use, & such acquisition will be out of the husb.'s power - And under some circumstances presents

N.B. This principle has since been overset by the Court of B.R.

of such things as plate or diamonds &c whether from the husb. himself or others, vest solely in the Wife without any condition annexed to the gift of their being to her sole & seperate use — But presents from the husb. of such things as are to be worn for ornament of the person must be considered in the light of

3.d Atk. 393 — Paraphernalia —

Of Paraphernalia. Paraphernalia comprehends the necessary apparel & ornaments of the Wife suitable to her rank.

3.d Atk. 393, 358. & 2.d id. 217. 1.st P. Wil. 729 — These the husb. during his life has power to dispose of but cannot by will deprive the Widow of them — But paraphernalia (except necessary clothing & bedding) is liable for simple contract debts provided all other personal property be first exhausted; for the right of the Wife to her paraphernalia is superior to the right of any legatee — And in case of Bond debts for which real estate is liable, if they be levied upon the paraphernalia, the Wife should have a right in Chancery to a compensation to the amount of the sum so taken, out of the real estate provided

2.d Atk. 77 — there be not a sufficiency of personal prop.ty to pay the same — So also if a creditor by specialty levies upon the personalty not leaving enough to satisfy the simple contract debts, the Creditors by simple contract may in Chan. come upon the realty to the amount of the specialty debt so levied upon the personalty — If the husb. pawns the paraphernalia of the Wife, she may redeem them out of his personal estate

according to Eng. principles paraphernalia is not liable for simple contract debts until all the other personal property is exhausted, & in case of bond debts it shall in Chan. be made good out of the real estate if the former be levied upon, while a sufficiency of realty can be had — this principle, it should seem makes the law in Connecticut different from the law of Eng. in case of intestacy, for here all property both real & personal are liable for simple contract debts, & if paraphernalia be exempt from the claims of creditors above other property it would seem to follow that in this State parapher-nalia would be protected from creditors until all other property was exhausted; this however is a mere conjectural conclusion resting upon no decision —

There is one case in the Eng. law where choses in action belonging to the Wife, follow the same rule with Chattels real, & that is where a judgt. is obtained in the life of the Wife but no exen. issued, (or if the action by its nature is not necessarily to die with the Wife, if it be commenced [illegible]) the husb. shall hold by right of survivorship & the money due on such judgt. does not go to the Wife's Representatives. But survivorship not being allowed of in this State it is questionable whether such judgt. debt must not go to the next of kin, & the husb. if admr. be only as a trustee for them — sed quere, & vide ante —

If the husb.'s Estate be mortgaged, & the Wife by her own propy pays the mortgage off, & then the husb. dies, the wife stands in the place of the

Mortgagee, & may hold the property untill the heir repays her the money, by her advanced —

Of the Husb.'s liability in consequence of marriage

The husb. is liable for all the Wife's debts contracted before coverture, provided they be sued for during the coverture, or as the authorities say, sued for & recovered during the coverture; otherwise not, unless the Wife at her death left choses in action sufficient to pay them — The husb. is also liable civiliter for all the torts of the wife committed before marriage under the same restriction of being sued for in her lifetime In both cases the wife is liable with the husb. & must be sued with him, & if the husb. die before the claim is enforced or during the pendency of the suit the claim survives against the wife —

Esp: 122
P. Wil. 409.

For civil wrongs committed by the Wife during coverture in presence of the husb. the husb. only is liable, the wife being supposed to act in such case by coertion of the husband; but for such wrongs as are done out of his immediate presence they are both liable together, & upon the contingent of his death the demand survives against her —

Liability for the Wife's contracts after marriage

The general maxim is that the husb. is not liable for any of the Wife's contracts after marriage to which he does not either expressly or impliedly assent, either precedently or subsequently to the making of them — This maxim will not always hold good: the law in some cases creating a liability where an assent cannot reasonably be inferred — the established rules of law are the best guide

Husband & Wife

For contracts entered into by the Wife in that branch of the business which she usually transacts, the husband is liable, a previous assent being inferable from the practice — Articles which come to the use of the family whether usually provided by the Wife or not, are chargeable to the husb. but in no case is the husb. liable for money borrowed by the wife in whatever manner laid out, for she might squander it —

Esp. 123.

The husb. is liable for all necessaries furnished the Wife during cohabitation unless he has expressly forbidden all persons, or the particular one claiming, trusting her, in which case it seems he would not be liable —

Esp. 123 Sal. 118.

But the husb. is not liable for necessaries when the debt was contracted under illegal circumstances; as if the Wife be taken into custody for some offence, by the Sheriff, & trusted when she ought to have been in prison —

Esp. 123.

If the Wife purchases articles of clothing & pawns them before being made up the husb. is not chargeable; but otherwise it is, if they be made up & worn before they were pawned —

Sal. 118.

When the husb. turns away his Wife or runs away from her, or by cruel treatment compels her to leave him, he is liable, while thus separated, for her necessaries according to her degree & it will be of no avail to forbid her being trusted in such case —

Stra. 1214. Bul. N.P. 135. Esp. 124.

If the Wife elope without cause the husb. is liable for no necessaries furnished to her during elopement unless he receive her again

Sal. 119 Stra. 647 Esp. 125.

And in case of such elopement it is immaterial whether the vendor knew of the elopement or not provided it was a matter of common notoriety —

5 Esp. 875. But it is hinted in one case that if the Wife return & be not received by the husband it will be sufficient to charge him for necessaries contracted after such rejection but this can not be law in case the elopement was with an adulterer —

1st Bos. & Pul. 339.

If a man cohabits with a woman to whom he is not legally married, allowing her to assume his name, & thus passing her upon the world for his wife, he will be chargeable for her necessaries during such cohabitation, in the same manner as for the necessaries of a lawful wife —

Bul. N.P. 136.

In case of a seperation by consent — (it being notorious) & the wife capable of earning her living by her labor, the husband is not liable, but the Wife's earnings must go to pay for living — sed quere, for how can she be sued?

Bul. 136 Sal. 118.

In case of a seperation, & a reasonable seperate maintenance assigned by the husband competent to the support of the Wife according to her rank. the husband is not liable, but the Wife is in all cases liable for her own contracts as a feme sole but in case of a mere elopement she is not liable neither is her husband —

1 Esp. 126

N.B. This doctrine of the Wife's liability is now exploded —

It is a general principle that the husband & wife can not contract together, but this rule is not without exceptions; for where they have seperate property as they in some cases may have, they may contract respecting such propy & the contract will be good —

N.B. perhaps the intervention of trustees would be necessary in such contracts.

Husband & Wife –

Articles of seperation entered into between husb. & Wife will be binding upon both parties to the full extent of the agreement as effectually as upon any other contracting parties –

H.Blac. 334 –

Femes covert not having seperate property cannot ordinarily speaking be liable for their contracts; neither ought they so to be, for all their property vesting either absolutely or sub modo in the husband, the husb. is in justi--ce bound to pay their debts – But upon sup--position of her having seperate property, yet liv--ing with her husband she may be liable to the amount of such seperate property & no fur--ther – Neither can she be taken by Exn. & impri--soned, for that would be infringing the marital rights of the husband, which are not to be invaded on account of any civil liabilities of the wife,

But the remedy must in such case be in Chan. which in such case will order the Wife's trustee to apply such personal property & the rents of such real estate to the extinguishment of such debts as the wife either alone or with her husband had contracted they being such as she was capable of contrg.

Bro. C. 16 –

But if articles of seperation have been entered in--to by the husb. & wife & in consequence the wife lives seperately from the husb. with a competent seperate maintenance she is liable not only in Chan. but at law to the extent of her contracts. This doctrine of feme coverts being liable at law is strongly controverted by Powel & others who

1st. Ter. 5. This is not law.

asert that a feme covert is in no case suable alone in a Court of law, except when the husb. is civiliter mortuous, being in exile, having abjured the realm, an alien enemy, divorced a mensa & thoro, transported for a long period of time &c. that the seperate maintenance of the wife is liable only for necessaries & even then the husb. must be made a co-defendant. But for any other contract the neither the wife nor the husb. are liable, & that the arguments upon which the contrary opinion is founded, drawn from this conclusion that when the liability of the husb. ceases (as in case of seperate maintenance) the wife's must commence are fallacious. For in the case of wilful elopement, borrowing money &c it is an agreed point that neither are liable —

The true ground on which the suability of the wife is to be supported seems to be the seperation & renunciation by agreement, of all marital rights, & not because the liability of the husb. ceases. By such seperation the power of coertion ceases in the husb., & therefore the power of the wife to bind herself by contract revives. By the articles of seperation too, the wife renounces all claims to protection & support, becomes in fact divorced from him as it respects the civil tie, & shews herself to the public in the capacity of a feme sole. It is the competent seperate maintenance which exonerates the husb., (& it does it so effectually that if she becomes a pauper he is not bound to support her) but it is the seperation that renders her liable —

N.B. In a late case in Ter. Rep. this whole doctrine of the suability of feme covert is utterly exploded —

Husband & Wife

Mode of a feme cov-ert to con-veying real estate

In Eng. the only mode in which a feme covert can make a valid conveyance of real Estate is by joining with her husb. in a fine, or com-mon recovery. In Connecticut the husband & Wife joining in a common deed makes a good conveyance of the wife's lands.

By fine, in Eng. the wife without the Husband can make a conveyance which she cannot afterwards avoid, but the husband by dissent-ing any time during the coverture can nullify such conveyance. The reason why the wife can-not convey without the husb.'s assent is that he has a property in her lands for her life, & also for his own if the lands be inheritable & Issue be born alive. Neither can a feme covert dispose of her choses in action or Chattels real because the husb. has a right to profit by them if he chooses. But a feme covert having a seperate maintenance may dispose of her estate of every description so holden seperately, as a feme sole, provided the articles of seperation authorize her so to do, but the mode pointed out in such ar-ticles must be observed for hence arises her power.

H. Blac. 334.

A Devise however she is by Stat. prohibited making. In Connecticut it has been in one case decided by the Court of Errors that a feme covert may make a Devise

Husband & Wife -

Of the Wife's capacity to purchase-

A feme covert's capacity of purchasing by the Eng. law extends thus far, viz. her purchase will be good so far as to divest the vendor of the property & to vest it in the vendee unless the husb. disagrees to the purchase, which if done nullifies the whole contract & leaves the parties as at first-

The Wife may disagree to or nullify any con-tract or conveyance after the death of her husb. which was made by her during coverture, except those conveyances made by fine or recovery-

If a legacy be given to a feme covert it does not clear-ly appear whether it vests absolutely in the husb. or follows the destination of her choses in action, but the better opinion is that it vests absolutely in $\frac{e}{y}$ husb.-

By the common law of Eng. ~~of this State~~ if a feme covert lease her lands in conjunction with her husb., or he leases them alone for any term of time be it ever so long, it will operate only as a lease for the life of the wife & it would be the same in this State if the husb. alone made the lease. But by Stat. of Hen. 8th (which has no force here) a feme covert may lease for a longer term & be bound by it, provided the lease be made according to the restric-tions of the Statute, as 1st it must not be without im-peachment of waste. 2d it must be for 3 lives or 21 years- 3d upon an annual reasonable rent- 4th the rent must be reserved to the husb. & wife & the heirs of the wife -

Husband & Wife

Of the joinder of the husb. & Wife in actions — As to the joinder of the husb. & wife in actions, it is a rule that whenever the right of action would from its nature survive to the Wife she must join in the suit: the reason of this rule is that should the husb. sue & get judgt. in his

Cro. E. 537. Sid. 25. Yel. 89. Cro. J. 501. 538. Cro. C. 90. 1 Roll. 347. Sha. 79. Sal. 119 — own name alone & die without suing out an Execution, the wife would in such case lose her right, ~~for execution must go in the name of the Pltff or vathin of his legal Representatives~~ Debt on such judgt. must be brought by the legal Representative of the Pltff in the orig. action & the recovery would enure to his benefit in such capacity — & the rule is the same whether the right of action accrued to the wife before marriage, or during coverture —

And in cases where the right of action will not survive to the Wife, but yet she is the meritorious

N.B. here was an express prom. -ise to the Wife — Cro. C. 442. 11 Mod. 273. Sal. 114. Cro. J. 77. 205. 1st Ven. 264. — cause, as in the case of her exerting her skill for the benefit of the Deft., as in curing a wound; when the claim was for rent arising from her land, & when the promise was made to the wife personally, & for her services, it is said that it is optional with the husb. to join the wife in the suit or not —

Whenever the Wife joins in the action, if the husb. dies pending the suit, yet the Wife's right is saved —

But if the Wife joins in a suit attended with none

Cro. J. 644. 100. 1st Wils. 414. Can. 46. Sal. 117 — of the above mentioned incidents, the proceedings will be bad — A Bond given to the wife during coverture ought to be sued in the name

2d. Mod. 217 — of the ~~wife alone~~ husb. alone — but probably it would not be bad if ~~the~~ wife should join — When husb.

1st Bac. Abr. 500 — & wife are disseised of the lands of the Wife, they must join in the action. Ibid.

Where the right of action survives against the

Co. L. 351 / P. Wl. 343 / 1st Roll 6. — Wife she must be made a codefendant, but where the right does not survive against her, she must not be sued; & it makes no difference whether the wife became liable before or during coverture.

Of the liability of the Wife to imprisonment — 3d Wils. 124 — If the husb. & wife be arrested upon mesne process the wife will be discharged by filing common bail — But in this state we know no such thing as common, i.e. fictitious bail, & the husb. in the case put, must find real bail both for himself & Wife or both will be held in custody — But when Jud. is obtained it goes against both as well as in Eng. as here, & both may be imprisoned — It is however, to be observed that the Wife can never be taken or retained without the husb., for even if the husb. breaks gaol the wife must be released when imprisoned on a civil suit, but the husb. may be taken & retained without the Wife — One case there is, however, in which the Wife may be taken & imprisoned without the husb., & that is where the suit was commenced against the wife before marriage, who marries pending the suit, for in that case the suit proceeds against the wife & execution will go against her alone —

In criminal cases it is otherwise for the Wife in such case is liable to be imprisoned alone even for a fine —

Of the husb's power over the Wife. — The old common law considered the wife much in the same light with a servant and

that the husb. had a right to chastise her; but it is now otherwise for it is at least doubtful whether he may use any kind of correction except it be moderate & reasonable confinement,
1st Blac. Com. 444. which seems to be allowed of, tho' absolute im-
Prec. in Can. 492. prisonment is forbidden —

1st 1. Bur. 542. But where articles of seperation have been enter-ed into, the husb. has no power even of restraint —
1st 1. Bur. 634 & in case of imprisonment by the husb. the wife may have relief by habeas corpus — if abused she can apply to the legislature for a divorce — if violence & menaces be used she may exhibit a complaint against her husband & having made oath to her being in fear of her life, she may subject her husband to bonds to keep the peace, her charge being duly substantiated — & in cases of menaces & cruelty unattended with personal violence he may be in like manner subjected to bonds for his good behaviour — & the husband when the suffering party, may have a like remedy against the wife —

What acts of husb. & Wife are merged by the coverture & what not. Contracts & obligations as Notes, bonds &c & indeed all rights of action which commence in presenti, or which would become due or operative during the coverture are merged by the coverture & rendered wholly void; & it is of no consequence whether the cause of action existed against the husb. or the wife — But the law is different with regard to those contracts which
Sal. 325 tho' entered into before coverture were not to be
1 Hob. 216. enforced untill its determination, for such contracts
5th Ter. Rep. 381. whether written or parol are not invalidated by the marriage

Husband & Wife —

If a feme sole make a will, & afterwards marries it will be a revocation of the will — But with the husb. marriage merely will not revoke the will, but marriage & issue will be a revocation — and if a feme sole submits a cause to arbitration, & marries before the award is made, the proceedings will be a nullity unless the husb. assents to the business going on, & becomes a party — the arbitration bond would however be good in such case against the feme —

1st. Haw. P.C. 5 — If a married woman commits an offence whereby a penalty is incurred ~~which~~ is recoverable at the suit of any individual upon the Stat., the husb. is liable ~~is liable~~ to such prosecutor for such penalty, but not for a fine inflicted upon her on conviction —

1st. Haw. P.C. 3d — If a wife in the presence of, ~~or~~ by coertion of the husb. commit a trespass, or even one of the lesser species of felony, as a bare theft, she will not be liable to punishment therefor — but in order to excuse her the coertion must be undoubted, & a mere command will not be enough to skreen her from punishment — & no coertion of the husb. will excuse the commission of the crime of treason, murder, robery & other capital felonies

1st. Haw. P.C. 4 — The wife is not deemed an accessary to her husb.'s felonies by receiving & concealing him, nor for receiving the husb.'s accomplice in company with him — nor shall she be deemed a principal for receiving her husb. when guilty of treason — But the husb. in all cases is liable for receiving the w.

Husband & Wife

The Wife cannot commit a theft of her husband's goods —

Husb. & Wife not allowed to be witnesses for or against each other — It is a general rule that the husb. & wife cannot be witnesses either for or against each other, so that neither would be permitted to testify against the other tho' offering so to do, & the other signifying his or her assent to its being done — in any other case Courts will permit a witness to testify against him-self, or against the person offering him —

This difference is founded wholly on the policy of preserving the harmony of the married state —

exceptions to the foregoing — In criminal cases there are two or three exceptions to the foregoing rules — as 1st when one exhibits articles of peace against the other, the complainant is allowed to testify to the personal abuse & the fear — 2dly in case of an indictment for any atrocious personal & secret abuse, the injured party is allowed to be a witness for the prosecution & that from the necessity of the case — & 3dly in case of high treason they may be compelled to testify —

Stra. 633

Vide also No. 6 - p. 87 -

— Of Marriage —

Of Marriage — The Law of England upon the subject of marriage is for the most part regulated by Stat. of Hen. 8th which declares that nothing (Gods law excepted) shall be allowed to impeach any marriage but within the Levitical degree, the furthest of which is between Uncle & niece — the rule as laid down in legal terms is, the next of kin & the next of kin to such next of kin

Of Marriage & Divorce

The relationship of affinity is a disability as well as that of consanguinity— The other Cannonical disabilities are those of precontract & imbecility These marriages are not in contemplation of law ipso facto void, but voidable by sentence of the Ecclesiasti-cal Courts, who have cognizance of all marriage contracts— & for such causes as preceded the marriage as consanguinity, & precontract, the divorce is a vinculo matrimonii; but for supervenient causes, the divorce is a mensa & thoro— In all cases of a divorce of the former kind the issue are bastardized by the sentence, but never by a divorce a mensa & thoro—

A divorce must always be had in the life time of the parties, for the Ecclesiastical Courts will not be permitted to bastardize the issue after the death of one of the parents—

There are other causes for which the law declares the marriage ipso facto void without the intervention of a sentence of Court, & the issue of course bastards— as 1st prior marriage & no natural or legal disolution of it— 2dly want of age— this disability may how-ever be remedied by the assent of the parties when they come of the age of consent which in males is 14 years & in females 12— But this assent (for if they do not dissent they are supposed to assent) must, to be valid, ~~made~~, be made when both are at the age of consent— If both or either dissent when ~~both have~~ arrived at the age of consent the marriage is void:—

Of Marriage & Divorce

If one be over Age of consent when married he or she may still dissent if the other be [illegible] married, for the privilege is reciprocal

Neither is allowed to dissent until both have come to the age of consent — sed ac hoc quere et vid 3 Bac. Ab. 578.

3d Want of ability to contract from mental infirmity. Formerly the issue of an Idiot was adjudged legiti-mate & so the marriage good — but by Stat. of Geo. 2 the marriage of lunaticks & persons under phrenzies are void — 4thly By Stat. of 26th Geo. 2d. The marriage of minors, unless widows & Widowers, without the consent of parents or guardians are void — To make the marriage valid according to this Stat. there must be an actual solemnization of the marriage by a Clergyman in orders after publication of bans, or a licence in lieu thereof from the metropolitan, in a Parish Church or Chappel, & in no other place except by dispensation from the Arch bishop —

6 Divorces a mensa & thoro are allowed for causes subsequent to the marriage as adultery, abuse &c — this kind of divorce does not dissolve the matrimonial tie, & the husb. retains his rights over the propy. tho not over the person of the Wife. He may release legacies, enjoy her lands &c, but over such alimony as is assigned her, he has no power — the sentence usually gives power to the wife to sue, & be sued without the husb. to have allimony during life, & to dower at his death unless she elope with an adulterer — But the husband is not liable for her contracts, & issue born in this situation are deemed bastards unless access be proved —

1st Blac. C. 433 -

Of Marriage & Divorce –

Connect.t law of marriage &c.

In this State marriages within the Levitical degree or in case of a prior marriage & the parties living, are ipso facto void, & the issue are bastards without any sentence of Court – There is however by Stat. an exception to the Levitical rule, making a marriage with a sister of a deceased wife, lawful; & probably the equity of the Stat. may extend to legalizing the marriage of a widow with the brother of her deceased husband – The age of consent is here as in Eng. – The Sup.r Court have power to divorce for adultery, wilful absence of three years without support – Seven years absence unheard of – and fraudulent contract – these divorces are a vinculo matrimonii; but the issue are never, by such decrees bastardized – The Court have power to assign the wife a support out of her husb.'s estate if she be the innocent party & to compel a compliance under a penalty – dower is further allowed, if the wife be the injured party – The Gen.l Assembly will divorce for other causes as personal abuse &c. & they will do it either a vinculo matrimonii or a mensa & thoro & in like manner do the British parliament – In the State of New York adultery is the only cause of divorce allowed by Statute, the issue are not bastardized & the offending party is forbidden to marry again The Chancellor has cognizance alone of Divorce by Stat. The Powers of the Gen.d Assembly in that State are like the Parliament unlimitted in such matters In the days of Popery, the right of celebrating marriages was in Eng. by usurpation solely appropriated to the Clergy & classed among

their sacred functions of Office - And all marriages not solemnized by one of the established Order were deem-ed void - When Popery gave place to Episcopacy in England this right devolved upon the Clergy of that Order: however marriages celebrated by Popish Priests were not deemed void: but those by dissenting ministers were, untill the time of the Commonwealth, when it was by Stat. render-ed a mere civil right & majistrates as well as Clergymen of all denominations were authorized to celebrate marriages - But after the restoration the right was again declared to be sacred, & revested in the Clergy of the Church of Eng: & in them alone, the same Stat. ratifying all marriages performed under the former one - After this most of the sectaries acquiesced, consider-ing it now no longer a conscientious matter but a mere civil right & the Clergy as deriving all their authority from the Stat. - some however continued scrupelous, & would be married only by their own Priests: but the Courts were liberal to them as they had been to all the sectaries before the Stat. in the time of the Commonwealth, taking it for granted when a man & woman lived together that they were married & refusing to examin into the legality of the marriage - But the Ecclesiastical Courts were obstinate in disallowing those marriages when applied to for Probates of Wills &c, & in such cases frequently exercised their power of bringing the parties so illegally married before them by compulsion & marrying them again

Of Marriage & Divorce

The Stat. of the 26th of Geo. 2d now regulates the matrimo-nial ceremony, & none are excepted from the manner there prescribed but Jews & Quakers - Sevenday Bap-tists yet refuse compliance & experience the lenity of the Courts as other non conformists did before - In Connecticut marriage is considered as a mere civil institution, & the Clergy as well as majestrates are mere civil Officers in respect to their right to celebrate marri-ges - They are both restrained by the Stat. which gives them their authority, to the County where they reside, & it is an agreed point that out of their own Counties they have no more right to celebrate a marriage then any other person; & it remains a question yet undecided whether a marriage celebrated by a Clergy-man out of his own County is not ipso facto void; & it seems certainly to have no more validity than one celebrated seriously & in earnest, by any other person - vide No. 6. p. 38

Of Bastards

The rule of the Civil law which obtains in most European Countries, is that Children neither begotten nor born in Wedlock may become legitimate by the subsequent marriage of their parents; but the Eng. law as well as our own makes it necessary to the legitima-cy of the Child that it be either begotten, or born, or both, in lawful wedlock; & therefore all those are Bastards who are born before the marriage of their parents or during the cohabita-

Of Bastards

of their parents by means of an illegal marriage; such as are considered void without a sentence of divorce; & in England, are divorced a vinculo matrimonii which proceeds upon the ground of the marriage being void ab initio - such are bastards also as are born forty weeks (or by favor forty weeks & ten days over) after the death of the husband - So also in case of marriage, & absolute impotency is proved upon the husb., or an impossibility of access be shewn the issue of the wife will be deemed a bastard - In the last case the law was formerly, that no proof of non access was allowed but that of being beyond sea; but in later times other evidence of want of access is received, but if the proof be not positive & undoubted, access will be presumed -

Sal. 122 484- Stra. 925. 1076-

When a woman who is divorced a mensa et thoro has Children the presumption is that they are bastards unless access can be proved - But in case of a separate maintenance, if the wife has children, they are presumed to be legitimate; unless it can be proved that there was no access; this presumption tho' hard upon the husband is a legal one - If a man marry a woman who is with child by another man still the issue is in law considered as the legitimate child of the husb. - If a wife elope & live in adultery with another, still her children born while living with the adulterer are

Sal. 123.

considered as legitimate unless the nonaccess of the husb. can be proved — If a woman marry immediately after the death of the husb., & a child be born, if it be within seven months of the death of the 1st husb. it will be considered to be his; but if it be not born untill forty weeks after the 1st husb.'s death then the child is the child of the second; & if born any time between seven months & forty weeks after the first husb.'s death, the child may choose which he will consider to be his father —

Bastards by the Eng. law and by ours also are incapable of inheriting or being inherited to, except by lineal descendents; for by the maxim of law that he is the child of no one he can have neither lineal ancestors, nor collateral relatives — Tho: this is the legal reason of the incapacity of Bastards to inherit, the true reason is founded in policy to prevent by every discouragement the illicit connection of the sexes — Bastards may acquire property by purchase but with this restriction, that they must take it by their reputed name; for a grant or Devise to J.S. & his Son, will not vest the property

Cro. E. 510. Co. L. 3. — in the ~~—~~ bastard son altho' J.S. has no other son, unless indeed the bastard be notoriously called the son of J.S. — & even it is said, that if the grant be to J.S. remainder to his eldest issue to be begotten upon

Quere & vide Hargr. Note Co. L. 3. — B. legitimate or illegitimate, B.'s bastard son by J.S. cannot take: & in no case will the word son, issue or the like, supply the omission of the reputed name, in a grant or devise

Of Bastards

Moor. 10. It is said in one case that if a mother devise to all her Children without other description that her bastard child shall take among the rest, but this is contrary to general principles. Courts of Chancery are not governed in their decisions by such legal niceties in this business, but will have regard to the manifest intention of the grantor – In one case a Bastard gains a right to inherit; & that is where a man has a bastard by his wife before marriage, & being dead his bastard son takes possession of the estate &

Co. L. 243. 244 dies seised; his issue will in that event hold the land in preference to the legal heir –

The maintenance of Bastards is pointed out in the Eng. Stat. & that of the State of N. York as to mode is nearly if not exactly the same, & the object in both is not the relief of the mother but the security of the parish or town from expense. The mode is this. the mother having upon oath charged a man of having gotten her with child it is the duty of the Justice to seize & commit such putative father unless he will secure the parish against the event of the Child's becoming chargeable, or enter into bonds to appear & answer to the fact charged upon him at the next Sessions – & if either the father or mother abscond their property, if any, may be taken in security –

Of Bastards

But no woman in such circumstances is bound to answer any interogatories respecting the business unless she offer it untill one month after the birth of the Child—

In this State the law is different, for our Stat. compels the putative father to assist the mother in the support of the child; And the due process of swearing the Child, binding over &c being observed, the County Court will at the suit of the mother compel such putative father (unless he can exculpate himself upon the trial) to be at one equal half of the expence of maintaining the child untill four years old - & also to pay one half of the lying in expences - Executions are issued quarterly by the Court against such father for the maintenance money, subject to augmentation or deminution at the discression of the Court, as circumstances require, to be entirely stoped if the Child should die, or to be continued even after four years if the Child should by misfortune continue peculiarly expensive after that period— And if the mother neglects to prosecute the Select men may pursue the business for the indemnification of the town if there is danger of the child's becoming a pauper—

But it is necessary that the mother should charge some one with ~~being the~~ having gotten her with child before a prosecution can be instituted; & yet it is very questionable whether if a woman declines she can be compelled to swear the Child merely to give the Select men an opportunity to prosecute the business— Vide No. 6 page 88—

Of Infancy—

Liability to punishment

There are several periods at which children are considered of age for particular purposes— A Child can in no case be punished for a crime under seven years of age— from seven to fourteen his being punishable or not depends entirely upon the fact of his being doli capax or not— & tho prima facie he is considered to be excusable on the ground of his incapacity to distinguish between good & evil, yet it is a maxim that malicia supplet aetatem, & Blackstone says that the presumption is not in their favor after ten years & 6 months old— quere de hoc— After the age of fourteen they may be punished for any crime, & must be unless want of understanding be demonstrated— Between the ages of fourteen & twenty one Infants seem to be excepted from the general rule that where ever a person is indictable criminaliter for a wrong, he is liable civiliter for its accompanying fraud— for an Infant altho' ~~liable~~ indictable for a cheat is not answerable for the fraud in a civil suit—

Not liable in civil actions for frauds—

An Infant is not liable for slander untill seventeen years old, this is a singular case— An Infant may be an Executor at seventeen but cannot be an Adm. untill twenty one— & that because in the latter case bonds are required & an Infants bond would be void— In this State it has been doubted whether

Of Infancy

an Infant can be an Exr. because our Stat. requires a bond from an Exr. as well as an Admr. but it seems a better opinion that the law is not changed as to the age ~~&~~ necessary to be an Exr., but rather that our Stat. enables such minor Exr. to give a valid probate bond — The age of consent to marry is fourteen in males & twelve in females – the same in both sexes is the age of discretion for choosing* Guardians

*Age of [illegible] Cont. by Stat. [illegible] age of choosing Guardians is 14 in both.

Co. L. 89. b. Note 83. The age necessary to the validity of a will of personal property, is, said by some writers to be fourteen, ~~but~~ in males & 12 in females, but by others at different periods up to seventeen, [Seventh] which (viz. 17) is the age fixed in Connecticut by ~~—~~ Statute — Real Estate cannot be devised either in Eng. or in this Country untill the age of twenty one, which period concludes the age of legal minority in all cases – & at this period they become liable for ~~contracts~~ contracts as well as torts – But under the age of twenty one they are liable for no contracts except for necessaries, & must sue & be sued by their guardians – The necessaries for which an Infant is liable are food, clothing, physic & necessary instruction, & no further if he be sub potestate parentis unless such parent be too indigent to furnish necessaries, or be so unreasonable as to refuse them, in which cases the Infant, it should seem, would be liable

Not liable except for necessaries –

It is a general rule that Infants are liable for necessaries. & it is another general rule that an Infant may rescind all his contracts except for necessaries –

Of Infancy

These privileges it is rational to suppose were estab-lished to prevent Infants from being injured by their own indiscretion & others knavery, & not as it seems to be held up in the ancient authorities to put it into their power to injure others, for it is there said that if an Infant sell his horse & recieve his pay, he may reclaim the horse with-out refunding the price—

The rule respecting the necessaries for which an Infant is liable, is that the things furnish-ed as necessaries, be really such, at the time & under the circumstances which they are furnished considering the Infants situation in life—& no greater price will be allowed for any article so furnished however costly, than would have been adequate to the purchase of the like arti-cle being of a quality suited to the condition of the infant— And from this consideration seems to arise the true reason why bonds given by an Infant for necessaries are not good—for it is necessary that all the contracts of Infants be looked into to see whether they were really necessaries or not; but this privilege can-not be had in actions on Bonds with a pe-nalty, & most other sealed instruments, for their consideration may not be enquired into: there-fore they are all avoidable by an Infant tho' given for necessaries— The reason laid down in the Books is that an Infant must not be allowed to

subject himself to a penalty, but this reason seems not well founded, for at the present day the penalty of a bond is allowed to extend no further than to the actual debt or damage —

Bills of exchange & promissory notes are not good against an Infant; because they being negotiable their considerations are not to be gone into after the first transfer — But for all parol contracts & written securities too for necessaries, the consideration whereof may be gone into & regulated according to justice, an Infant is liable — Single bills or bonds without penalties (they not specifying for value rec'd) are binding upon infants; & yet it is said the consideration may not be gone into, it being a common maxim that sealed instruments are not to be questioned as to their consideration — but it is apprehended that the
1. Ter. Rep. 39 — maxim is not universal, & that the consideration of single bills may be gone into — So a sealed instrument detailing the contract, may be given in evidence in a suit on the contract — so that it seems such sealed instruments as specify the consideration may be ~~[illegible]~~ examined as to the genuineness of the consideration —

Infants are not bound by an acc.^t stated — the reason is as the law formerly stood, the consideration of an acc.^t stated could not be attacked, for the items could not be questioned, & therefore Infants should not be bound by them — But the

law respecting accounts stated is now different, for the items may be questioned - but the law respecting Infants in this case has not kept pace with the reason of the thing, for such acc^ts are still as such not binding on Infants - The reason laid down
Co. L. 172. Cro. J. 560 Pop. 151. Cro. E. 920 in the Books why an Infant is not liable upon an insimul computassent is, that an Infant is not capable of stating an account -

Our law in Connecticut is in principle the same with the Eng. law upon this subject, but a different usage respecting notes makes a difference in that particular - A note of hand in Connecticut is upon the same footing with a bond under seal in Eng., & the consideration not to be questioned - & it is supposed that it is upon that ground that by a late decision of the Court of Errors Infants may avoid their notes given for necessaries

An Infant is not liable for debts contracted in the course of his trade or usual business: nor for money borrowed even to purchase necessaries with, unless
Sal. 279 - 386 - the lender sees to the laying out of the money in the purchase of such necessaries -

It has been a question whether if a bond be avoided the contract revives which was merged in it: the better opinion is that where the original contract was not corrupt in itself or contrary to morality or good policy, the contract does revive upon the avoidance of the Bond which failed for want of legality in form: but if the contract be corrupt it perishes with the obligation -

Of Infancy

Authorities differ upon the point of an Infants Bond being void, or only voidable - but it is the better & more reasonable opinion that they are voidable only, it being left to the Infant upon consideration to determin whether the contract be to his advantage or not - But when it is necessary to consider the bond void absolutely, in order to save the Infant from harm, the Courts will so consider it; for an Infant must not be permitted to bind himself to his hurt - But tho the Infant may be allowed in some cases to treat his bond as absolutely void, still the other party to such contract cannot so treat it - The manner of avoiding Obligations is for the Infant when sued to plead his Infancy - & when he is the Obligee, he must renounce his right & reclaim the consideration -

A promise after coming of age, to pay will make the contract good made during Infancy even tho' an implied one, if it be but sufficient to evince a waver of the privilege of Infancy - Tho' promises made by Infants are not binding, still those made to Infants are, altho' there be no reciprocity of obligation, for the promise of an Infant tho' not binding, is deemed a good consideration, for the consequent promise on the other side -

Stra. 938 -

Of Infancy-

When an Infant having sold an article would rescind his contract, his action to recover his goods sold is trespass, unless where there has been an actual delivery of the goods by the Infant in person, in which case trespass will not lie but an action of trover is the proper rem-edy- And when the Infant being the vendor res-cinds his contract & takes back his propy the purchaser cannot have an action of im-plied assᵗ. nor any other founded on contract for the recovery of the purchase money; but it is conjectured that trover might be main-tained for the money, Infants being liable for torts- but this conjecture is no where supported by a decision; & the notion of the liability of In-fants for fraud in contracts is opposed by the whole current of authorities -

It is a question whether the Stat. in Connecti-cut has not altered the common law relative to the liability of Infants- By the Stat. some con-tend that all liability of Infants even for ne-cessaries is taken away ~~by our stat~~ unless the Infant be entirely without the government & control of his parent guardian or master; while others contend that the Stat. is merely in affirmance of the common law upon the subject-

Of Infancy

It is a general rule that where an Infant does an
Burr: act which in Chan.y he would be compellable to do,
1794 he shall not be allowed to rescind it—
In case of an Infant Executor his acts in course
of his Executorship, provided they be regularly &
equitably done will bind him; but if other-
-wise, as if he should release an unpaid debt
due to the estate, such an act would be of as lit-
-tle validity as if done relative to his own person-
-al concerns— If an Infant confess judg.t the
Court on motion will set it aside—
It is a general rule in Chan. to allow an Infant
six months after he comes of age to make applica-
-tion for ~~its~~ the revisal of such decrees as affect him—
Guardians how appointed— In England & in New York the parent may ap-
-point guardians to his children by will: but in
this State it is otherwise, for here guardians are
appointed by the Judge of Probate by nomination
of the Infant if of competent age to choose, but if
not, or if being cited the Infant refuse to choose, the
judge appoints absolutely—
Manner of suing & being sued— In all cases of suits in favor of the minor they
must be in his own name joining the Guardian,
(or in some cases the prochein ami) merely to assist
the minor & secure the adverse party his cost—
& in like manner a minor must be sued in his
own name joining the guardian in the summons.
If a suit be brought against an Infant without

the guardian it will not, or that cause abate but be contin^d. for the purpose of citing in the guardian; & if this be not done the Court will appoint a guardian pro hac vice. But a judg^t without a guardian would be erronious but the error might be corrected in the same Court.

It has been a question whether a Stat. of limitations runs against a minor when he is not expressly excepted out of the general provisions of the Stat., but it is the better opinion that it will. And if the Stat. began to run in the life time of the ancestor, the intervention of the minority will not stop it.

Judicial acts as fines & common recovery can not be rescinded by the Infant after he comes of age but must be done during his minority; but all other acts may be rescinded at any time.

If there be a judg^t against an adult & an Infant, & that ~~without~~ guardian to the Infant, it would according to Eng. principles be reversed in toto: but in Connecticut only as to the minor.

In many, & indeed most cases, an Infant will not suffer by his own negligence as in a case of a conveyance by fine, five years peacable possession will bar all claims of a rightful owner if he be under no special

inability to claim, but Infants are not thus barred - So in case of a legacy due to an Infant legatee, interest will be recoverable upon the legacy after one year, tho' the legacy be not demanded, but other legatees will not be allowed Interest if they neglect to make demand - But a minor must perform any particular condition annexed to an estate (bequeathed to him) by the donor, & can not be privileged against such neglect, as if he is to have Black acre upon condition of paying over such a particular sum upon such a contingency happening - But a minor is not liable to a penalty for not performing a condition tho' he be compellable to perform it -

As to the acts of an Infant respecting his personal estate, the general rule is, that they are voidable but not ipso facto void, except where to save the Infant from harm, it is necessary to consider such act void ab initio - As to the conveyance of real Estate by Infants, the most unexceptionable rule is, that all such grants or Deeds made by Infants, as do not take effect by the delivery by his hands, are void - But that all such gifts, grants, or deeds made by the Infant by matter of deed in writing delivered by his own hand, & thence taking effect, are voidable merely, & may be avoided by

3 Burr. 1804 - him or his heirs & representatives entitled to such estate unquestionably the obsolete method by livery & seizin was voidable only. tho' it has been doubted of other species - [illegible]

Of Infancy

It is strenuously asserted by writers that the rules which govern Courts of Law & chancery are the same - but this is not true for in very many cases Chan. will decree that which is totally repugnant to the rules which govern in courts of law - The Chan. Courts, however, will not break in upon the fundamental & unquestionable principles of Law but taking the established principles for their guide they have pursued a very different line of practice from the courts of law, upon the ground, not of subverting, but of considering the original principles as having been misapplied - If an Infant at the age of devising personal property, give a bond & then devise his personal property to pay it: tho' such bond would be void at Law & the Executor not liable to pay it, according to the directions of the will, still in Chan. he would be decreed to pay it - So a bond given for money borrowed to be laid out in necessaries will be decreed to be paid by the Infant, if it is in proof that the money was actually so laid out - So too the whole class of agreements respecting marriage settlements made after the age of consent but during minority & consequently void at law, will be carried into effect by a Court of Chan. provided they are equitably & properly made -

vide also No. 6 page 89.

Of Parent & Child

Of the property of the Child –

The parent has no interest in the property of the Child who is at any age capable of acquiring property by any mode of purchase & that even before he is born. But an Infant can acquire nothing by his labor, for the parent is entitled to his services – In any civil suit against an Infant, he must in person be sued, the father only being summoned as guardian to the Child – A parent must be accountable to a Child for his estate which has been under his protection, as natural guardian, & even tho' the parent should become bankrupt, he will, tho bankruptcy notwithstanding, at any after period be liable to the suit of the Child for his property – The father is the natural guardian of the Child & no Court has a right to appoint a different one to the person of the Child, but to the Estate they may – All manner of actions in favor of Infants must be brought in their name, & even an infant may have an action of Assault & battery against his parent in cases of ~~most~~ outrageous personal injury maliciously inflicted – The power of a parent over a child seems to be a judicial one, for his guidance & correction – & for want of discretion in inflicting chastisement the parent is not to be punished altho' it be done with improper severity – But if it be done with a malicious & wicked intention, & be undeserved, the parent would be punishable – Masters, guardians, & tutors are in this respect upon the same footing with parents –

Parent & Child -

liabili-ty of parents for torts of the Child

Minors after the age of fourteen (& sometimes before) are liable for their torts & for some of them their parents are liable also - As in case the wrong is committed at the command, instance, or request of the father, or in his proper business - But when done at the mere motion of the Child without the presence, or request of the father & out of his proper business, the Infant alone is liable & the parent not - & the same rule holds good of the actions of a Servant of any description

liability to the Childs contracts

If a minor contracts debts, the parent, guardian or master will not be liable for the first contract, because there is no evidence from the fact, that the parent &c countenances it - But if he shews no disapprobation, but suffers the minor to go on making contracts, he will be deemed to assent to them & so be liable - If an Infant purchases articles, which with the knowledge of the parent or master &c comes to the use of his family, such parent will be liable to pay for them tho' the Infant be not - When the Infant purchases necessaries for himself which the parent unreasonably withholds from him, the parent will be liable as well as the Infant - & indeed all kinds of contracts for necessaries for which an Infant can bind himself, are binding upon the parent (except it may be some kinds of Education above what a Court would consider a parent holden for) & the Creditor has his election to proceed either against the parent or the Child -

Parent & Child-

If a minor trades for himself in other things than necessaries, either by the express or implied consent of the Parent, the parent is liable, tho' the Child is not- & if in such case, the son gives his Obligation for a Debt so contracted, & afterwards avoids it by a plea of Infancy, the contract will so revive that the Parent may be subjected upon it—

Of the mutual obligations of support

In England the mutual Obligations of support, incumbent upon Parents & Children are regulated by Statute & in this State our Stat. is in effect the same- by these it is made the duty of lineal relations to the degree of Grandparent ascending & to that of grand child descending mutually to support each other in case of coming to want- The father by construction is liable before the grandfather & the son before the grandson- Where there are a number of sons of unequal property each must contribute to the support of the Parent or grandparent in proportion to their ability; & where the value of their property is equal but the amount of their savings unequal the Court in apportioning to each his share will have regard to such consideration- but ceteris paribus the Court will take notice of any inequality of fortune which the sons have rec^d from such indigent parent- It has been decided that Sons in law are not compellable to aid in the support of of their wives' ~~father~~ parents, nor can such married Daughters unless they have seperate property, be called upon during coverture for the support of their parents

But daughters when not under coverture are liable as well as the sons, to yield support to their Parents &c.

According to Eng. principles if a man marry a widow who is a pauper, he is not obliged to maintain her children who are paupers; neither if the widow & her children had a sufficiency is he after marriage obliged to support the Children; but in such case he may not by taking his wife's property, reduce her children to want without being liable to support them — & it is the rule that if the wife could not have supported the children the husb. need not, but if she could have done it, if she had not married, then the husb. must do it — But this obligation of maintenance ceases with the determination of the Coverture — Whether the law in this State relative to the obligation of stepfathers to support their wives' children be the same with that of Eng. is doubtfull, no decision having been had upon the subject, but it has always been the practice for the husb. in such cases to maintain the children of his wife —

[Margin: Quere et vide 4th Ea. L. 76.]

Interest in the services of the Child. The parent has an interest in the services of the Child & may have an action per quod servitium amisit against any one who should inveigle or force him away, & shall in such case recover for all his expenses as well as for the loss of service: but whether any action will lie for the injury done to the feelings of the parent for such abduction unless it be of the heir, has not been determined — but from the exemplary damages which are given in the analogous case of debauching a daughter, the inference is strong that the action would lie —

Parent & Child –

Tho it is the duty of parents to educate their children, the common law used little or no coertion in this matter; but by Stat. in Eng. the children of indigent parents may be apprenticed; but the education of other children is left to the ~~[illegible]~~ discretion of the parents – But there are some prohibitory statutes, forbidding under severe penalties the education of children in the popish religion either at home or abroad – In this State the Stat. upon that subject not only gives power to the Select-men & with the approbation of a Majestrate, to bind out the children of improvident parents & bad masters, but also imposes a duty upon all parents & masters to instruct the children under their care to read, & to know the laws against capital offences; or if unable to do that, at least to teach them some orthodox catichism –

Protection is another reciprocal duty between parents & children, hence a parent will be justified for a battery in defence of a Child, & in like manner a Child in defence of his parent – & the same indulgence is extended to the case of guardian & ward; but in order for this justification to be extended thus far, it must appear that the parent or child in whose favor such interference was made, was the one first assaulted, & not the assailent in the original affray, unless the one interposing be ignorant in what manner the contest began; for if a child come up & find his parent engaged he has a right to presume his parent to be the injured party, & may justify a battery in his behalf so far as to relieve him; but if it should turn out that the Parent was the assailent, such parent would be liable to the injured party for the consequences of both batteries – These reciprocal rights extend also to guardian & ward, husb. & Wife –

Guardian & Ward –

By the laws of Eng. there are several sorts of guardi[ans]

As 1st Guardian by Chivalry by which the lord of the fief had the custody of the person & estate of the heir untill twenty one years old without liability to account, & of the heir female till sixteen – This species of guardianship ceased with the tenures by knight service –

Co. L. 87 b. Note 65

2dly Guardian by socage – This species of guardianship too is unknown in this State, tho in most of the others as well as in Eng. it obtains, where one dies leaving an heir to a socage estate under the age of fourteen, & it goes of right to the next relation by blood to whom the estate cannot by possibility descend; & if there are several relations of equal degree & under no legal impediment, the one who applies first must be admitted – This guardian has the care of the infants person & real estate by socage tenure, but not of his personal estate* – This guardianship ceases at fourteen when the Infant may choose his, or her, guardian & the guardian by socage is accountable to the minor, on his property, but while the lands are in his hands the guardian may improve them as he pleases – In the State of N. York there is no difference except that by a different mode of descent from that in Eng. the right of guardianship in socage is some what altered, & with this further exception that in N. York the socage guardian is liable for permissive as well as wilful waste, whereas in England he is liable only for wilful waste – In both Eng. & N. York they have a Stat. which makes a socage guardian who holds over his time, liable as tres passer.

ibid. Note 66 –

*quere Co. L. 88 b. Note 67

3d Guardians by nature, who is the father, & to him belongs the custody of the child till twenty one – He is however supposed to act in the character of guardian only in the defence of the property of the son, & for this he is liable to account for the property of the child like any other guardian

Ibid. Note 66 –

Guardian & Ward

[…]gure. Co. L. 87 Note. 66. & treat too not only after the child comes of age but even before that time — A guardian natural, as well as other may be sued by prochein-amy; & even an Infant may by prochein amy bring a suit against any other person provided the guardian consents but does not choose to risque a suit himself — But an Infant must in all cases defend by guardian —

3. L. 88. 6. 4th. Note 67. Guardians by nurture who is the parent. it is a guardianship of the person merely untill fourteen. at which time if

N.B. In this State we have no guardians by nurture. the natural guardian be dead the Child may choose one — & if a Child has neither father nor mother in Eng. the Court of Chancery may appoint one 'till fourteen — & in Connecticut

Co. L. 89. a Note 70. if the father only be dead the judge of Probate may appoint a guardian untill fourteen, when the Infant may with the approbation of the judge of Probate elect one: but in case of the minor's neglecting to choose the former guardian continues — Courts of Probate have also power to appoint guardians of Infants properties not coming by their father, even, during the father's life, & it may be the father if a proper person, & the minor being of age to choose, elect him: & the guardianship may extend to the person of the minor if the father be insane — vide a late Stat. —

Ibid. Note 68. 69. Testamentary guardians are not known in this State tho' in Eng. & 3. Atk. 519 New York they are, & they preserve their authority untill twenty one But a mother cannot by testament make a guardian —

2. Wils. 129. 135. A testamentary guardian cannot lease his ward's land —

Prudent management in a guardian, tho' not the most beneficial to the infant, will shield such guardian from harm — If a guardian trade with the monies of the Ward he is usually speaking liable to account only for the principal & Interest, but some times he has been in Chan. compelled to account for the profits of the trade — In Eng. it has been the modern practice to call guardians to account in Chan. & not by the old action of acc^{t}. But in Con^{t}. the action of acc^{t}. is universally used, for the powers of Chan. to call Guardians [illegible] here is doubted; for Chan. has nothing to do here with the sett. of estates it being done by the Courts of Probate under the correction of [illegible] Sup^{r}. Court —

Guardian & Ward—

The guardian in England has a right to account, & often does it, even annually, to the Chancellor, without being called upon by the ward: & in this State he has the same right of accounting with the Judge of Probate.
In this State all guardians are bound with surety to the faithful execution of their trust, except natural guardians & so in Eng. are some kinds, but those by testament & socage are not unless specially called on by the Chancellor for security, or to account annually—
2. Vent. 353. If a parent as guardian has a legacy in his hands due to the Child, he cannot appropriate it to the support or education of the Child, but must account for it in full—
If a guardian compounds for the debts of the ward for less than the real amount, the ward & not the guardian is to have the benefit of the saving—
The guardian has no right to change the nature of the ward's estate as from real to personal & vice versa, without permission of the Chanr., or in this State of the judge of Probate, & if he does do it, the ward may reclaim his estate in specie, & all the relief that Chan. would give in such case is to decree a reconveyance to the guardian of the property which he had assigned to the infant in lieu of his property so reclaimed—
The Chancellor is properly the guardian of all orphans, & if any one marry a ward of the Chancery without consent of the Court, or of the guardian by the Court appointed
2. Wils. 110- or approved, such person would be punishable for a contempt.
P. Wil. 107. 121. If there be two or more guardians & one dies the guardianship survives— When guardians misbehave themselves the
1. P. Wil. 703. 705- Chancellor may interpose & displace them—
A guardian is bound to take charge of all personal property of the ward which may come into his hands, but yet an Executor who has charge of all the personal property, is not bound

Guardian & Ward

in paying over to the guardian the legacy due ye Ward for thô ~~if~~ the guardian on receiving it, should pay them over
7 B. Wil. to the Infant, still the Exr. may be liable to the Infant
285 - for it, when the latter comes of age - The reason of this seems to be that Admrs. are all under bonds with sureties & Exrs. tho' not so in Eng. are as much holden personally as andg, but guardians, at least, testamentary guardians, & guardians in socage are not, consequently the legacy would not be so safe as in the Admr's hands: but all guardians being bound with surety in this State it should seem that the reason can not operate here, & of course it would be safe, & probably is a duty, in the Exr. to pay over the legacy, but there has been no determination upon the point - By Stat. in N. York the guardian may compel the Exr. to pay over the money upon, giving security that he the guardi-an will account with the ward for the same — vide No. 6 page 89

Of the Sett. of Children - There are two kinds of settlement of Children, the one derived from the parent, the other acquired by some act of the Child him-self - Whenever the settlement of the parent is, there is that of the Child, untill by some act of his own he acquires a new settlement when the former ceases of course - There are some doubts whether our Stat. does not alter the matter of sett. but there has been no decision - Those Children whose parents have no settlement, as foreigners, are entitled to a settlement where born - If the mother has a sett. & the father none the child follows the mother's settlement - Bastards by the Eng. law are sett. where born, unless when by fraud or the like the mother straggles into another pa-rish & is delivered, in which case the Bastard belongs where the mother usually resides - In this State the bastard is entitled to the mother's settlement —

Master & Servant-

Servants are of several descriptions - as 1st Slaves 2d Apprentices, 3d Menial Servants 4th day labourers, & 5th agents factors &c - The common Law of Eng. does not recognize any such thing as Slavery considered in the sense of the person of the Slave's being a mere chattel - Neither does it appear that the common law of this State sanctions that degree of Slavery which exists here, there never having been a decision of Court upon it in this State which is necessary to authorize one to say that the existing custom is law - Neither does the Stat. in express terms authorize Slavery; but it does, nevertheless exist in a meliorated & qualified sense - Our Courts consider the right of the master to extend to the services of the Slave only & therefore trover, for taking him away will not lie as for property - A Slave too here, has a capacity to hold property, it is said even against his master -

Of slavery.

Aprentices - It has ever been the Case that an apprentice to render him bound by law must be apprenticed by indenture; & that no parol agreement will bind him; but the case is different with other Servants - And by custom of London which has been adopted in some of the States but not in this, the indenture to make it operative must be enroled - The Stat. of Eliz.h gives infants power by indenture to apprentice themselves, not so however as to make themselves liable in Covenant, but such indenture secures the apprentice who observes such engagements, the right of exercising his trade in any part of the realm - & it secures, to the master, such right in the apprentice as will enable him to bring any action against any one who injures or entices him away -

Of apprentices -

S. Ray. 1117. Sal. 68.

Cro. J. 179.

Master & Servant

By the custom of London minors above the age of fourteen may bind themselves apprentices by indenture which will bind them in the same manner as if of age; by
L. Ray 633. Sal. 68. custom of London too, Apprentices are assignable which is contrary to the common, Stat. law of Eng. or Connecticut

The master always covenants to instruct but if he die his Exr. is not liable upon that covenant it being a mere personal engagement — When the Master further covenants to find the apprentice with meat, clothing &c it seems highly reasonable that the Exr. should not be holden, but yet the authorities are not agreed upon ye point
Lev. 177 Sid. 216 & from the authorities it seems also doubtful whether the Executor has a right to the apprentice's services or not — By custom of London the Exr. must find the apprentice a new master of the same trade — An apprentice can acquire no property by his own earnings, but
Sal. 68. all shall go to the master & that whether he be a legal apprentice or only one de facto — So that if an apprentice abscond & work for another on hire & get his pay, still the employer must pay the master & be liable besides for employing the apprentice — But it is otherwise with a menial Servant for if he acquire property he may hold it, & if his employer has paid him his wages he will not be compelled to pay them again to the master, tho' to be sure he would be liable in damages for employing such runaway Servant knowing him to be such: & the Servant would also be liable to his master — A master may moderately chastize both apprentices & hired Servants in Eng., in this State the former only — In Eng. when no particular time of service is agreed on, the engagement is considered to be for a year; in this State when left uncertain it is considered to be at the will of either party —

Master & Servant—

Of the contracts of Servt. It is a general rule as in the case of husb. & wife that wherever the Servant may be considered as acting by permission & approbation of the master, the master is bound by his contracts, as when the master usually sends the Servt. to take up goods for him upon trust, or employs him to transact any certain kind of business; & a promise made to a servant acting in such capacity, will bind the promisor as much as if made to the master & he can bring an action upon it— If the servant purchase without either the express or implied permission of the Master, but yet the master recieves the

Ld. Raym 224. articles to his use & benefit he will be liable for them— If the Servant is cheated in transacting his master's

Cro. J. 223. business the Master can have an action therefor—

For all torts committed by the Servant at the instance, com-

torts of the Servt. mand or desire of the Master, or in his usual business the Master is liable, but this liability does not exculpate the Servant— But for all torts committed at the mere motion

Ld Ray 739 of the Servant & out of his master's business the Servant

Sal. 441 1st. Vent. 295. alone is liable—

The master is liable for injuries done by the unskilfulness of the Servant in his business—

If a Servant uses fraud in his Master's business tho' it be without the knowledge or direction of the Master yet will

Sal. 282 the master be liable, & the reason of this is that the master who employs the Servant & ought to provide faithful ones,

5 [illegible] Rep. 75 & ought to suffer rather than the inocent dealer whose business it is not, to know the character of another's Servant, & tho' the Servt. himself is liable for such fraud, still this would afford but a partial remedy as they are generally worth nothing. But with regard to this matter the authorities are not agreed

Cro. J. 469. ~~&~~ & so the point is not clear of doubt— And it is said in

Pop. 143 one case that if a Master send his Servant to sell his property in a fair or market overt, the Master is not liable tho' the Servant do cheat the buyer ever so much, sed quere of this—

Master & Servant-

Bac. 58 The owners of a Ship are liable to the freighters, for any misma-
Sal. 440. -nagement of the Master - But the rigor of the common law in this respect is somewhat softened by a Stat. of Geo. 2d, which makes them liable no further than to the value of the Ship &c

The case of Postmasters is an exception to the gen.l rule of the liabi-
D. Ray. 646. lity of masters, for it has been decided that the Postmaster Gen.l
Com. 487. is not liable for the neglegence of his deputies - & the reason as-signed for ~~for~~ this exception is the necessity the Postmaster Gen.l is under of employing so many persons, & those too so remote, that the hardship would be intolerable to subject him for all their faults - For all those contracts of the Servant for which the Master is liable, the Servant is not, for they are in law considered as the acts of the Master & not of the Ser-vant - & if the Servant has gone so far in his master's business as to engage in his own name, & so make the contract his own, he is then liable & not the master, for in no case are they both liable for the same contract.

But for all kinds of torts the Servant is liable as well as the Master, except in such cases in which the Servant unknowingly is the instrument of a tort by command of his master, as where the Master locked one into a room & gave the key to his Servant to keep, which he did, not know-ing that he was thus assisting in unlawfully imprison-ing the person - If a Master order a Servant to kill his neighbor's horse, & he does it, both are liable in trespass. But if a Servant in his Master's business carelessly injure another, tho the Servant may be liable in trespass, the Master alone can be made liable in an action on the Case & so in other cases where the injury was not done by the direction or permission of the Master-

There are cases in which a Servant would be liable to his
o. J.
.65. master in an action for damages, as when by his misfeasance or his nonfeasance the Serv.t suffers articles committed to him to be lost-

Master & Servant

Servants are liable criminaliter for stealing from the master, tho' this was formerly doubted; & it is now the Common law that if a Servant run away with & dispose of the property committed to his care, he is not for that guilty of felony, unless he use fraud in getting the property put into his hands that he might run -away with it,: in which case it would be deemed theft; but at common law it is necessa-ry to constitute theft, that the taking be unlawful & animo furandi in the beginning, except in the abovementioned exception – By a Stat. of Hen. 8th to embezzle his master's goods is made felony in a Servant – but whether the principles of that Stat. have been adopted in this State is doubtful, & indeed it has heitherto appeared that the opinion of our Supr. Court was in favor of Common Law principles –

A servant may justify a battery in defence of his master when the injured party, in the same manner as a Child may in defence of his parent.

And by some it is said the Master may justify a battery in defence of the Servant. but the better opinion is that he cannot because he

Sal. 407. may have an action per quod servitium amisit –

It has been always holden that Masters & Ser-vants may do most of those things which in others would amount to the legal offence of maintenance, & indeed they may do all except paying out money for each other to assist in car-rying on the suit – But the whole doctrine of maintenance is now obsolete –

Master & Servant.

In England it is necessary for an apprentice to ser-
-ve seven years in order to entitle him to carry on
his trade in any of the incorporated towns.
In this State there is no such regulation. In Eng.
justices of the peace have a very arbitrary power of
binding out minors at the request of men of a certain
quantity of property whether the minor be willing or
not; so also to force any one of a certain quantity of
property to take an apprentice or pay a certain pe-
-nalty for refusing. But apprentices who are thus bound
out may by the same Magistrate be relieved from the
obligation for just cause, not however by him immediate-
-ly, but, he will bind, on proper application, both Master
& servant to appear at the next sessions, which court have
power to release the apprentice. But those who are
apprenticed by themselves or guardians are out of such jus-
-tices jurisdiction & left to their suits upon the covenant.
In this State & in New York the justices have no such power
of binding out, except in case of indigent Children who may be bound
the Males till 21 & the females till 18, & in this State that
is done by the Select men by approbation of a Justice,
But our Justices & County Courts have the same power of
liberating apprentices of all descriptions which in
Eng. they have with respect to such as are arbitrarily bound.
In the State of New York they have a Stat. empowering In-
-fants to bind themselves with the approbation of parents
or the surviving one, so as that the infant will be holden
though the parent be not. In case of emigrant Infants
no consent is necessary, & under certain circumstances
ldc
o. 6.
pe 90. they may bind themselves untill twenty four years old. &
such indentures are assignable as by custom of London.

Of Bailment—

Bailment is the delivery over of property from one to another, but the general property still remaining in the bailor — By the Eng. law there are reconed six kinds of Bailment — In one kind of bailment under certain circumstances, nothing will excuse the bailee if he lose the property bailed; & that is where the bailment is in nature of a Pawn: if the money be payed or tendered, if the bailee or pawnee keeps the pawn after demand, no accident by which it is lost or injured will excuse him — It however, does not seem to be properly speaking a bailment after the money is tendered, for by that act the property in the pledge is revested abso-lutely, & the pawnee if he retains the property is a wrong doer; but before the tender the pawn is upon the ground of common bailment —

In another kind of bailment the bailee is liable in all events, except the loss be by act of God or the public enemies of the king; & that is the Case of Common Carriers, Posts, hoymen &c — & the case of Inkeepers, & Sheriffs are similar, this severity is founded entirely in policy —

A 3d. sort of Bailees are not liable even for gross negligence if there be no fraud or collusion in the business this is the case of mere naked bailment which affords the bailee no advantage —

In a 4th. kind of bailment the bailee is liable if he exceedes the limits of his bailment — as if the bailee hire the bailor's horse to go ten miles & he goes further or to go to one place & he goes to another; after exceeding the limit of the bailment he is liable absolutely for any loss or injury —

5thly. — A bailee of an article borrowed without paying any thing for the use of it is required to keep & use the thing borrowed with care, or he will be liable for its

Of Bailment

6th — A Bailee of a sixth description is one who undertakes to take care of, or convey any article to any place without reward — neglegence in this too will subject the bailee — If we were to consider the pawnee after tender & refusal, the hirer who exceeds the limits of his bailment & the borrower who does the same, as wrong doers as they ought in strictness to be considered, & not as bailees — all Bailments might be reduced to three kinds, to wit —

I. Common carriers, & such as are under like obligations being liable in all events except in case of loss by enevitable accident, or the act of the Public enemies —

II. Common Bailees, who are liable only for negligence, & that whether there be a reward in the case or not —

& III. Naked Bailees who have no reward, & to subject such the neglect must be very gross indeed —

Common Carriers & bailees of that description are not suable in actions of trover unless an absolute conversion can be proved — formerly the usual action was an action on the Case according to the Custom of the Realm, but now the action of Asst. is the only one in use; this action states the fact of the betrustment, the direction to deliver the article, & then raises an asst. that the Deft. promised to deliver &c as pr. agreement —

These Carriers have a lien upon the goods by them carried, for their fees — & they may have an action against any one who injures or takes away the goods so entrusted to them; & so indeed may the bailor if he choose to look to the wrong doer rather than to the carrier; but if the bailee has first brought his suit, the bailor is precluded from

Of Bailment

bringing ~~his~~ a suit against the wrong doer but must look only to the bailee which in case of the bankruptcy of the bailee is a hard case — Neither can the bailee have an action after the bailor has sued the wrong doer, unless he has suffered some particular damage besides the loss of the goods, in which case for such special damage an action will lie, altho' the bailor had recovered the value of the goods — The same principles which hold in the case of Common Carriers extend also to many other descriptions of men, as ferry men, Posts, Inn keepers, Sheriffs, & indeed all such as hold themselves up to public view as undertakers for gain & being founded on Common law, are operative in this State — In England Innkeepers do not as in this State depend upon any authority for their appointment, but still the Eng. law respecting Innkeepers applies to our taverns

Inn keepers — Vid. Co. L. 89 — & Hargraves Notes, upon it

Inn keepers have some privileges peculiar to them — as 1st the Lord of the manor can not distrain the Cattle of travelers upon the land of the lord, while remaining at the inn — 2dly An Officer who finds the outward door open ~~just~~ cannot justify breaking an inner door for the purpose of serving a legal process (as in other houses he may) either upon the Inn keeper or his guest — the Stable is also protected from breach for that purpose —

But an Innkeeper is compellable to receive guests, an action lies for the refusal — & even his refusal is an

Sal. 18 indictable offence, the fullness of his house & some other very reasonable matters of excuse may justify his refusal — He is also bound to receive the travellers horse &c. but not inanimate things (baggage excepted) such as

Sal. 388 afford him no profit, & if he do receive such things to keep, he in so doing is a mere Common bailee —

Inn keepers

The Inn keeper is liable for the goods (baggage) of the guest which are stolen out of his house, or stable unless it be done by the Serv.t of the Guest, or by his consent, & that
p.178 whether he be particularly desired to take care of the goods
b.32 or not — When the host directs the Guest to put his things into a particular apartment, or that he will not warrant
10a 7/5 them, & the guest neglects to do it, & loss ensues, the Author-
b.32 ties are divided as to his liability — It will not save the host
b.33 harmless that he delivered the key of the door where the goods were placed, to the guest & that he left the door unlocked whereby they were lost — If the guest deceive the host about the value of the goods & through that means they be lost, the host will not be liable, at least further than for the supposed, or represented value of the articles — & the same rule in this respect holds good of the liability of Common Carriers — If a horse be put out to pasture without the direction of the Guest & be lost, the host is lia-
b.32 ble but not if the guest directed it, unless the horse be very carelessly kept. — In order to create this liability in the host, the guest must be a traveller or one keeping at the Inn at tavern price — Neither are Inn keepers liable for the loss of dead goods which yield no profit, unless the owner be with them, for if absent but two or three days tho' with design to return, yet the host is not liable for the goods
13 p.179
9.188 if stolen in the owner's absence —

b.271 An Inn keeper has a lien for his pay both upon the goods & person of the guest, & may even take them on fresh pursuit; but if the lien be once given up, it cannot be revived — If however a horse only be left at the inn, the lien extends only to him & does not reach the person of the owner — If a horse be left by

a stranger still the lien holds for his keeping even against the true owner tho' the horse was left without his knowledge: but he may not use the horse while in his possession tho' it be ever so long — An Innkeeper
9 Co. 87 may refuse any thing to his guest untill his pay is offered ——

Of Escapes —

The Sheriff is as bailee of the body of the prisoner. There are two kinds of Escapes voluntary & negligent. A voluntary Escape is when a prisoner escapes either by the consent, or connivance of the Sheriff or his gaoler. For a voluntary escape the Sheriff is liable at all events & by the old law which is now antiquated, the Sheriff or his gaoler was liable criminaliter to the same extent that the prisoner would have been had he been retained — & in case of the escape of a debtor he was liable by fine imprisonment or to the extent of the debt — But in modern times in case of the escape of a criminal the Sheriff is indictable for a misdemenor & punishable at discretion — unless the escape be suffered by a Deputy, gaoler or in which case such guilty person is alone liable, the Sheriff never being liable criminaliter, for the acts of his deputies — But civiliter is to the amt. of the debt lost, by the Escape, whether suffered by him personally or not. & the action may in Debtor case — And not only in voluntary, but even in some negligent escapes the gaoler is indictable if the negligence be gross & palpable otherwise he is not ——

Escapes—

In case of a voluntary escape the Sheriff is liable in all events for the debt of the prisoner, neither can he recover it out of the prisoner after the escape, nor even meddle with him afterwards, & even if he should resign himself up, if the Creditor do not choose to detain him, & thus release the liability of the Sheriff; it is even said that the latter can not detain the prisoner so returning, for his own security, a moment against his will— & if on escaping the prisoner give a bond to the Sheriff it would be illegal & void—

A negligent Escape is one in which the the prisoner effects his escape in any way without the consent of the Sheriff, as if the prison be broken by insurgents whom the Sheriff was utterly unable to oppose; but if it be by act of God, or of the public enemies of the land, it is not such an escape as will subject the Sheriff— For a negligent Escape too, the Sheriff is liable in all events, except of the voluntary return, or reception of the prisoner on fresh pursuit, & that too in both instances before suit brought— but if a suit be brought but a moment before the Sheriff gets the prisoner into gaol again, the action will proceed— There has been some doubt what shall be deemed a retaking on fresh pursuit; but generally it seems sufficient if the prisoner be returned to gaol before suit brought altho' several days intervene the escape & reception— In case of a negligent Escape the Sheriff may retake & proceed against the prisoner for his own security altho' a suit be brought against him by the Creditor— All this applies to prisoners on Exn. & applies as well to those in custody & on their way to gaol as to those actually in gaol— But if a prisoner in custody on mean process escape before he get to gaol, the Sheriff is not liable provided he used his endeavours to prevent it; but after such prisoner is once in gaol the Sheriff is subjected to the same liabilities, as in case of a prisoner on Execution i.e. in England

Escapes –

In Connecticut it has been adjudged that if an Officer suffer a prisoner to go at large after being taken on Exn., it shall not be deemed an escape provided the Offr. have the prisoner in gaol in the life of the Exn.; & that a bond taken by the Offr. of the prisoner, for his delivering himself up is good – But after such Exn. prisoner is once in gaol the Offr. can not suffer him to go at large again even before the end of the 60 days allowed in sd. Execution – It is now settled, tho' formerly a litigated point, that the Creditor may if he choose come upon the prisoner again after an escape, & whatever he recovers out of him will go in mitigation of the damages in a suit against the Sheriff; & if the Creditor pursue his remedy so far as to bring the prisoner to gaol again, the Sheriff is thereby released from his liability – But if the Creditor voluntarily lets the prisoner out of prison without taking a new security his demand is gone – But a subsequent assent by the Creditor to an escape will not discharge the debt – It is now setd. both in Eng & in this State that an escape from the limits of the prison is a negligent & not voluntary escape unless the gaoler knowingly

2 Ter. 126 suffer a repetition of such escape – It should seem that anciently at Com. law the Sheriff was not liable civiliter for an escape, tho' long since by Stat. to an action of debt, & now too, to an action on the Case – The Courts in both countries have determined that in an action of Debt the whole sum of the demand is recoverable against the Sheriff, but that in Actions on the Case the real damages only is given, & the prospect which the Credr. had from detaining the prisoner in gaol is considered – This seems not just, for it is a rule that, where debt & Case are concurrent the recovery should be the same except where Case was the common law remedy & a Stat. steps in & gives

a remedy by debt, with a specific sum — This the Courts say is the case, in this matter; but it is apprehended in truth, to be otherwise For permitting a rich man negligently, to escape say the Eng. Courts small damages ought to be allowed against the Sheriff, because he can get his money of the debtor; but high damages for the escape of a Bankrupt, because the body is all that can be had, & that is considered while in custody an equivalent for the money — But our Courts reverse the case exactly from the opposite mode of reasoning —

For the whole doctrine relating to Escapes vide Sal. 271. 3d Co. 44. - 52 - Cro. E. 765, - 53 - Stra. 373. Cro. J. 419, 657. 1st Vent. 4 - 269 2d. Ter. Rep. 126 —

The question whether in actions on the Case for an escape the whole sum shall be recovered, has been variously decided in this State, but the last adjudications were that a sum in damages variant from the debt may be recovered — We have never in such cases used the action of debt — In this State if an escape happen through the insufficiency of the Gaol the County & not the Sheriff is liable — & if the debtor have property enough which can be come at the County is not to be holden liable —

Of Bailment —

The naked bailee to keep is not liable for a loss unless the negligence be so gross as to raise a suspicion of intending the Loss — The naked bailee to convey or to do a certain act, without a reward, is liable in case of a special under-
Ld Ray 909 — taking to perform carefully, if he be negligent —

The common Bailee who borrows, or hires or under-takes for hire being a mere private undertaker is liable unless he use ordinary care & skill

A Pawn is a pledge of personal property as a security

for a present or a preexistent debt - The liability of the pawnee is the same as that of a common Bailee - If the pawn be such a thing as can be kept without expence & be such as is not the worse for use, the pawnee may use it tho at his peril, for if he ~~lose~~ lose it in the use, he is liable at all events, but if it would be the worse for use, he may not use it - But a pawn which is expensive to ~~the~~ keep as a horse, may be used enough to pay for his keeping without liability, A Pawn is redeemable by payment of the debt for which it was pledged, or the tender of the money for the same, either of which reverts the interest of the pawn in the pawnor, so that he may bring trover for it - but the refusal of the money when tendered does not extinguish the debt - If there be no time limited for the redemption of the pawn - the pawnor is allowed his life time to do it in; & Comins says that his Exr. may redeem but other authorities are to the contrary - & if the pawn be assigned, the money for its redemption must be tendered to the pawnee, & not to the assignee ~~must the tender be made~~ - By agreement of the parties a pawn may be made irredeemable after a certain time, & then the pawnee may sell it, but yet it seems that if it fetch more than the debt for which it was pawned, the pawnee must refund the overplus to the pawnor - So also if he sell it evidently at a very great under rate, he may be answerable to the pawnor, but to make him so such undervaluing must be extremely obvious - Upon common principles, factors, taylors, & Blacksmiths have a lien on the articles in their hands in the way of their trade, tho they are not liable as bailees at all events, but are an excep-

w.j. 244.

And it is doubtful whether the right of lien extends in this Country to any but Strangers, in such cases, to secure against whose frauds these species of tradesmen at first acquired the right — There is one kind of bailment ~~whi~~ which divests the property out of the bailor entirely, & that is the lending those articles which are of a perishable kind or are for immediate consumption as eatables &c & are to be returned

Ray 39. in kind only — With respect to actions between Bailor & Bailee some distinctions from the common legal proceedings have obtained tho without reason — When the bailee has used the article differently from the design of the bailment the same action of trespass vi et armis lies for the thing when lost as would be given in ordinary cases — but when the main ~~purpose~~ of the bailment is observed, but cause of action arises, an action on the Case is the proper one & not trespass vi et armis But in the case of letting real estate, the action would be vi et armis as between other parties —

There are a great variety of cases respecting bailments of all kinds as it affects the bona fide purchasers of goods in the hands of the bailee — but the most general rule respecting it is, that if considering the usages which prevail the nature of the bailment be such as is calculated ~~to~~ probably to produce imposition, even tho' the bailor did not intend it, still the bona fide purchaser of the Goods in the hands of the bailee will hold them against the bailor who was the true owner As if A. buy the cattle of B. & leave them in the use & possession of B. as before & B. sell them to C. this last purchaser will hold them against A. — So whatever is sold in market overt, or whatever passes as money anywhere vests an absolute property in the vendee by the transfer altho' the seller were a mere bailor, or had stolen the article — So too if one leave merchandize with a merchant & he sell them, or if a

Of Bailment

Pawnee sell a pawn committed to his care the vendee shall hold them — & the reason is that by ~~letting~~ leaving the property in such a way with the Bailee it gives him an opportunity to deceive; & by being furnished with the appearance of property he is enabled to gain credit, which he otherwise would not be able to do — the case of the pawn before mentioned is rather an anomalous one for the vendee in such case would hold yet a creditor of the bailee could not take it for debt — But if considering the common custom of the country, the bailment be not calculated probably to deceive, tho purchaser though a bona fide one, runs his own risk, & the bailor, the true owner may take the property whenever he finds it — or at least may reclaim it by suit as if one purchase a horse borrowed for a short service or one stolen, or otherwise fraudulently obtained, he buys at his peril — So the sale of Cattle let, or those receipted to an Officer, or a portion let to a daughter, would be void, & the bailor may hold his property — these seem
Vez. 348 / 1st Wils. to be anomalous cases, as many there are, & tho latter peculiar to Connecticut ——— vide. No. 6 page 92 —

Of Contracts

The contracts of persons under a moral or natural inability, or who have not the exercise of their wills are void — The case of femes covert & Infants have been considered — As to such as are non compos mentis, as Idiots, lunatics &c their contracts are void.
4: Co. 123 / Ld Ray. 312 — / Co. L. 2. 98 & yet by a maxim of the Eng. Law that a man can not be permitted to stultify himself, Idiots & Lunatics cannot themselves avoid their contracts — but the representatives of an Idiot or Lunatic may avoid any of their contracts except conveyances by fine, or common recovery —

But then are modes of vacating the Contracts of such persons even in their lifetime - The king as parens patriae is guardian to all Idiots, & on Office found, has the care of the estates of all lunatics, as a trustee to account for the profits to the representatives of the lunatic - ~~his agent~~ On suggestion to the proper Officer a writ de idiota inquirendo issues & if on enquiry it be found that the person whom it concerns was non compos at the time of making the contract, such contract by means of a scirefacias is vacated; & also by the little gen^d. by due process -

The Chancery Courts only have this power of vacating -

It is not supposed that the maxim which prohibits a man stultifying himself would be recognized by our Courts -

It is said that an Idiot is presumed to assent to contracts in his favor, till some one of legal right dissents, & this because an Idiot is capable of taking prop^ty by grant -

Drunkenness is in Law no plea against a fraud - but in Chancery relief will be granted, if it appear that the other party used unfair means in getting the petitioner drunk - But the authorities do not go so far as to allow relief if the party taking advantage of the drunkenness had no hand in procuring it. & yet there is a principle in Chancery that when one takes an undue advantage of another's situation, or inability, relief will be given, this seems to come very nigh the case of accidental drunkenness - Weakness of intellect merely will not be sufficient to warrant Chan. in setting aside a contract unless it ~~a~~ amount to insanity, provided there be no fraud practised, but proof of a less degree of fraud will in such case induce the Court to interpose, than in common occurrences, & the Court will even in some cases presume fraud when the contract is extreamly unequal, & especially if it be with a sick or weak man, & it appears that he was greatly importuned, altho no deceit be in proof - The conveyance by feoffment is not considered as void, but voidable merely by privies in blood & legal representatives. Other contracts of the non compos are void as it respects mere privies, tho not as it respects the non compos

Of Contracts

- An alien whether friend or enemy can hold real propery
7 Rep. Calvin's Ca. either by grant, purchase or descent but a Denizen may hold by grant or purchase tho' not by descent — if an alien -in purchase it divests the propy out of the ~~vendor~~ but vests none in himself, for it escheats to the king — An alien cannot hold Chattels real for the purpose of farming — tho' a Merchant for the purpose of carrying on trade may take a lease of a house, store, & other conveniences for carrying on his business, but if he leave the realm during the life of the lease, the remainder will escheat to the crown. tho' it seems that if he alienate his right in such lease it would be good —

An alien friend may have personal property & is entitled to personal actions for the protection of it; but alien enemies cannot while they continue to be enemies, have any action for their protection — Formerly Infidels were supposed to be alien enemies, tho' their nations were at peace with Eng., but now, none are so considered whose nation is not at actual War with Eng — There is a silence in the books upon the question whether an alien enemy at the return of peace is entitled to draw Interest during the war —

Contracts are divided into Executory & Executed contracts

A Contract compleatly executed is when the article is actually transferred & the price of it paid —

An executory contract is one in which something is engaged to be done or not to be done, & the consideration is promised but no transfer is actually made, or possession given, tho' a right of action thereby may accrue — But the greatest part of contracts are executed on the one side, & executory on the other, the transfer made, but not the compensation, or the compensation made, & not the transfer, & so not entirely open nor entirely compleated — When contracts are reduced to written Obligations they are considered as executed contracts —

2dly Contracts are divided into express, & implied ^constructive Contracts

Express Contracts are such as are made, so by the express words of the parties — Constructive contracts are such as are raised by

Courts out of written instruments which evidently carry an intention variant from the letter – these two are founded on the assent of both parties; & so that an implied Contract is said to be, but it is not true in fact, & Courts establish them not on the ground of mutual assent, but merely because it is right that it should be so. No contract (unless it be some mercantile transaction) will be binding without a consideration, but the quantum of such consideration is immaterial; & in an action on Contract it is necessary to state the Consideration in the declaration, unless it be on an obligation purporting value rec^d. in which case it is not necessary, for tho' it be a general principle that all Contracts whether parol or written are void without a consideration, yet it cannot be enquired whether these instruments carrying value rec^d. on their face, were really for a valuable consideration or not, without impugning another maxim of law which is that no parol testimony will be allowed to falsify, or contradict a written declaration – & therefore if an instrument purporting value rec^d. yet recites the consideration & it appears to be nothing in fact, & that appears upon the record either by the declaration or the pleadings, being set out on oyer, the declaration would be demurrable brought on such instrument – It is a rule that a promise made upon a prior subsisting moral obligation is valid, altho' tho' no legal obligation attached to the promisor by means of such moral obligation previous to his making such promise – But a promise made without any consideration, or any prior moral Obligation is void – And a former promise which in itself gave no ground for a recovery will not constitute such a moral obligation as to make a promise to fulfil such first promise, binding – So if a feme covert whose promise is absolutely void, engage to pay any sum, or give an obligation so to do, no promise after the determination of the coverture, to fulfil such former engagement or obligation, will make them valid: otherwise it is with mere voidable promises – It is a general rule, tho' admitting of many exceptions that when the consideration is past the subsequ-

Of Contracts

promise creates no legal obligation: but if there is a pre
request to do an act, this requested consideration will be
sufficient to give validity to a subsequent promise -
Cro. E. 12. Tho' by the ancient doctrines no act however meritorious
59 - Cro. J. 18 or beneficial to the promisor, ~~would~~ if not done in consequ
Cro. C. 409 of a present, or precedent request, would lay a good foun
- dation whereon to support a subsequent promise, yet it
is now holden that a subsequent promise of compensa
- tion for a beneficial act, will bind the promisor tho'
not previously requested — but when a kindness is done
without any antecedent desire, or subsequent promise
no recovery can be had — To give validity to a Contract
it is not necessary that the consideration be a valuable
one, as money marriage &c, for a good consideration, as good will, will be suff
- icient — But no good consideration merely, will bind an
executory contract in Law, tho' Chancery will often en
- force them — but in a contract executed a good consider
- ation is sufficient, except against antecedent Creditors
against whom it is not good unless there be property enou
- gh left to satisfy their claims — but a valuable con
- sideration without fraud is good against all —
There must not only be a consideration, but it must be
a possible ~~one~~ in the nature of things or it will be a nulli
- ty, but such impossibility in order to nullify a Contract
must be a physical impossibility, & not merely a
Ld Ray 1164 - thing impossible to the undertaker from his particular
circumstances — A consideration possible when the con
- tract was made, but afterwards becoming impossi
- ble by act of God, of the law, or of the Obligee, renders the con
tract null — But in written contracts or obligations, if the
performance of the obligation be possible & the condition
be only impossible the obligation is said to be binding un
Sal. 172 - less indeed, such condition is so interwoven with the obligation
on the face of the instrument, as to be inseperable, in which
case the whole is said to be void — a curious distinction indeed

Of Contracts

Such contracts, the object of which, is either contrary to morality or to policy, & so either malum prohibitum or malum in se, are either void or voidable — & when an illegal contract appears upon the face of the pltff's declaration a demurrer is the proper defence, but if the illegal consideration do not appear on the face of the declaration, it may be pleaded & such plea supported by parole proof, even tho' the suit be on a speci-

Wil. 141 -alty — Among other considerations which are mala prohibita is that of a bond conditioned to renounce wholly ones employ-ment which makes the bond void because it is against sound policy; but a bond with condition not to exercise ones trade

553 6. 596. in a particular place is not void provided there be a proper consideration for such relinquishment, & it is peculiar to bonds of this description that the consideration must be an adequate one for so watchful is the Law for the advance-ment of commerce & manufactories, that prima facie it presumes all contracts to be bad which tends to the restraint of either, & permits the consideration of such

Wil. 1 partially restraining contracts, tho' by specialty to be enquired into — If a Sheriff take a bond of his prisoner that he will remain in gaol untill he has paid for his board, it is void for the law will not allow a man thus to imprison him-self; or if the Sheriff take a bond conditioned to let a prisoner es-cape it is void 10th Co. 99 — Marriage brokage bonds & con-tracts with young heirs for their expectances are voidable in Chancey, but not at Law as other contracts built upon illegal considerations are, but no good reason for this differ-ence is assigned — If one bind himself to save another harm-less for doing an unlawful act, the bond is void — But if in such case the Obligee were ignorant of the illegality of the act, the bond would be good against the designing obligor —

Bonds the object of which is to impose upon third persons, or to injure them in person reputation or property, are void —

As to the parties engaged in an illegal contract the Law

will assist neither, for the contract being void the law will not aid the parties to it, in order to effectuate it. Neither will it aid one of the parties to recover back such money as he has paid to the other party upon such consideration, in both cases the maxim holds in pari delicto potior est conditio defendentis — But it seems that if money be paid to induce an illegal act, but such illegal act be not done the payor, may have an action for the recovery of such money, sed quere —

Doug. 467

The rule of potior est conditio defendentis extends only to those ~~are~~ illegal contracts in which the parties are in pari delicto; for those laws which ~~are~~ make ... contracts in order to protect the necessitous part of the community against the powerful, are at the present day (tho' perhaps not formerly) upon a different footing as, for instance, the law against Usury whereby the both parties may act unlawfully yet they are not in pari delicto, & the injured party is allowed his action, for the recovery of money paid upon such contract.

Doug. 670 Cowp. 791.

Of Usury —

There are a number of Eng. Stat.s which go to invalidate securities given for illegal considerations, but which do not affect the original Contract; of this sort are supposed to be the securities given for money lent at the time & place of play — But when the Stat. aims at the contract itself, not only that, but all agreements concerning it whether written or unwritten, are nullity.

At Common law all kinds of Interest was illegal, but by a Stat. of Henry 8th it was made lawful to a certain rate, & the same Stat. prohibited as unlawful taking any thing more than was thereby prescribed, terming such excess, usury

Of Usury—

By the Stat. of Ann if any more than 5 pr. Ct. be reserved in the security, the security is void: & if the security is for the legal sum but more be taken in fact aside from the security the taker is subjected to the treble forfeiture by the Stat. imposed — by our Stat. the forfeiture is single which constitutes the only difference in our law from the Eng. — There are two kinds of usury as above hinted, the one is when too high Interest is reserved ~~or~~ too much is put into the obligation under the name of principal, and this works a forfeiture of the whole obligation if the Obligor chooses to avoid it; but it does not subject to the forfeiture of the Stat. unless such exorbitant Interest be actually recieved, for the usurer does not become liable merely for contracting for illegal interest but by actually recieving it — The other kind of usury is when the obligation is a legal one, not reserving too much either under the name of principal or Int., but a sum extraordinary is demanded & taken aside from the obligation — In this case when the extra sum is paid ~~or agreed~~ at the time of borrowing & the obligation is given in a legal form to cover the usury it falls under the first head of reserving too much, & avoids the obligation; but if such premium be an after donation the obligation is not affected, tho' the reciever would be liable to the Stat. penalties — Money may be lent & interest taken at the legal rate per annum, for a less period than one year & it will not be usury tho' more than 6 pr. Ct. will be the result — Compound interest if secured by after obligations will be scollectable; but if the Note be given at first in terms reserving interest upon interest no more will be allowed by the Court than simple interest whether it be a court of Law or equity. If one loan a sum of money, & take a security for the sum loaned only, but at the same time as part of the contract, & to cover the usury, sell to the borrower property for more than it is worth & in this way get an extra premium for the money loaned, it will make void the obligation, it being all illegal from the connection.

With regard to Bills of Exchange & negotiable notes it has been

Of Usury—

a question whether they come under the Statute of usury, but it has been finally determined that they &c, & are void even in the hands of innocent holders. this from the necessity of the Case to prevent evasions of the St. the original obligee transfers a usurious Note to a third person, & afterwards the obligor renews the note in the hands of such honest purchaser, he can not afterwards avoid such renewed Note, tho' he might have done the original — The lex loci which governs in many things

Fer. Rp. 425. (tho' by no means in all) regulates the question about the rate of Interest; & a note carrying Int. at 7 pr. Ct. given & payable in the State of New York is collectable in our Courts — It has been said that a Note executed in this State by a citizen of this State to an inhabitant of New York, & payable there carrying 7 pr. Ct. would be good, but this can hardly be conceived to be Law — Another unsettled question has been agitated which is, ~~whether is~~ whether if the contract be made in this State, a note given upon it & payable in New York would be good at 7 pr. Ct. int.; it should in this Case seem that neither the place of contract nor of pay would be so conclusive of the point, as the nature of the Contract as, for instance if the contract be for goods to be taken in New York it should seem that 7 pr. Ct. would be lawful but if for lands lying in Connecticut it would certainly be usurious — But if two Connecticut men, for the sake of avoiding our Stat. should go into New York & there one should give the other a Note reserving 7 pr. Ct. int. it would in our Courts be deemed usurious —

2 o. C. 501. Mistakes either in law (as the casting interest by a wrong standard) or in fact as the putting too much into a note by miscasting, will not render the Note usurious —

In cases of hazard, as of insurance &c. there is no fixed rate of

209 interest or premium, but it is more or less according
to the greatness of the hazard, of which the parties are the judges
68. But the hazard must be real, for if colourable only, the
contract is usurious — Under this exception of hazard come
the contracts about letting Cattle to double once in three years
&c, but in order to have such loans legal, it is necessary that
the person who makes the loan should run the hazard of their
loss — It must be a real loan of Cattle, & not of money
or the worth of ye cattle — for if one actually loan Cattle &
at the time of paymt. the borrower having no cattle to
pay ~~offer to release~~ but offer to take for another term
so many Cattle nominally, as the ~~money~~ worth of the
cattle then due, if in money, would purchase, & it be
done accordingly, such ~~was~~ reloan would be usurious —
There is a practice in this State of loaning Sheep at more
than 6 pr. ct. & yet the borrower hazard accidental loss, but the
legality of the practice may well be doubted, it never having
been sanctioned by a judgt. of the Supr. Court —
52. If one contract to pay another the money borrowed or
69. otherwise due by a day certain, & if not, to pay him
an increased sum by way of penalty, it is not usurious,
unless the contract be colourable merely, & made with
an understanding that the penalty should be incurred.
The custom of Merchants charging their goods at an ad-
vanced rate above the cash price ~~seems~~ to be of an usuri
ous complexion, but has been settled not to be — proba-
bly however the customary advance only could be safe-
ly charged — When the Obligor cannot make proof in
Court of Law of the usurious contract, he may by filing
a bill of discovery in Chancery appeal to the conscience of
the obligee, & if he admit there to be usury contained in the

1 Wils 286 1 Lth 301 obligation, the Chancellor decrees all the usurious to be struck out & the principal with the simple interest to be paid – But in this State the Stat. provides that when an action is brought on such an Obligation the deft. may file his complaint on the 2d day of the Court to which the suit is brought, complaining that there is usury contained in the note. in which case the Court will proceed as a Court of Chancery to enquire of the Pltff on oath, & if it be found that the obligation contained usurious interest, the court are by Stat. ordered to expunge all the interest whether legal or illegal, but are bound to render judgt in favor of the Pltff for the principal sum due. Formerly the practice upon this Stat. was to admit both Pltff & deft. to testify contrary to the established rule of Chancery, which allows only the party appealed to testify, & in conformity to this rule, is now the practice upon this Statute –

To get rid of an usurious obligation or other written security, it is in Eng. necessary to plead the illegal matter specially, but if an usurious Contract be by parol it is admissible to give the matter in evidence under the general issue – In this State the Eng. practice has been uniformly followed, not absolutely necessary – If a third person sue the Obligee for usury it was formerly held that the Obligor might be called as a witness provided he had paid up the obligation but not otherwise, but this distinction is now done away & the Obligor is admitted to prove the usury, whether he has paid up his note or

Bur. 2251 for the record of a conviction cannot be given in evidence in an action on the Note – In this State however

old Eng. practice holds, from our Courts excluding such from testi-fying as have an interest in the question— N.B. This is now otherwise—
A contract for the purchase of an annuity tho' such annuity be more than the legal Interest of the sum paid is not
52 usurious provided there be no provision for the return of the principal— For the whole subject of usury vide.
5th Co. 70. Cro. E. 27, 642, 741, &20— in this last authority, it is said that in a usurious Note if the obligee on recieving his money take nothing but the principal he is not liable to the penal-ties of the Stat., but that if he do take a farthing for Interest upon such Note, he will be liable to the penalty for taking too much—

Of Contracts—

A writing either with or without a seal, detailing the Contract at large is only an evidence of such Contract but not strictly speaking a specialty, & an action may be brought either upon the writing which is the Evidence of the Contract, or upon the Contract it self, & the writing be given in evidence. Such writings, & such only, as are for valuable removing the consideration behind the curtain so that it cannot be enquired into, are specialties; & upon them & not upon the original Contract must the suit be brought, unless they are so circumstanced as to be in themselves void; as for example, the bond of a feme Covert, in which Case the original Contract is not in the smallest degree affected by the exe-cution of such void Obligation— But such obligations as are merely voidable do, till they are avoided absorb the original Contract; but upon the avoidance of the obligation, the original Contract revives again—

Of Contracts

Ignorantia legis non excusat is a maxim of law, but it seems to admit of some exceptions; for when fraud is practised to draw a man into a contract, taking advantage of his actual ignorance of the law, it seems that a party
P.Wms 239 thus imposed upon may be relieved against such contract in Chancery, this doctrine is however in most cases denied, tho' it seems a reasonable one - but on the other hand if there be a compromise of a right doubtful to the
[illegible] 187 parties, ignorance of the law will not entitle to relief it being completely a bargain of hazard - But when it appears that a party was not sufficiently apprised of his right, tho' no fraud was practised, still equity
3 P.Wms 315 will relieve - Ignorance, in cases where the party was drawn into a contract by imposition, of the other party is always relieved against either in law or equity - When equity is resorted to, the mode of relief where the deception respects the main object of the contract, is to set the contract aside entirely, but where the deception does not respect the main object in the bargain but only a collateral matter, inducing an advance, the relief is partial, not nullifying the Contract, but moderating the consideration, or turning the party over in action for damages - All cheatings produced by frauds calculated to impose, may be relieved against at law, in Eng: it is by action of fraud affirming the contract & demanding damages - In this State if the contract be induced by an entire & total fraud, it will be nullified & the action may be for money had & rec. as if there had been no consideration, but if the fraud be partial only, as if a horse worth ten pounds only on account of a secret disorder or the like, be sold for twenty pounds the Eng: mode of affirming the Contract & demanding the damages must be resorted to - So in case of the sale of real property by quitclaim deed, & the consideration paid, there being no title, & the bargain brought about by imposition an assumpsit lies for recovery of the price paid; but not when it is a bargain of hazard - In case of covenanting to be well seized & a failure of title insue, an action of Covenant is the proper one, & perhaps the only one which will lie; yet possibly in debt assumpsit might lie the ...

Of Contracts—

The maxim of caveat emptor is not true in its full extent; for if a purchaser is really deceived by the false representa-
-tions of the seller, tho' he had it in his power by examina-
-tion to undeceive himself, still if he does in fact trust to the vendor, & is thereby really injured, he will be entitled to relief; & in such case the enquiry of the Court will be not so much whether the deception might have been avoid-
-ed, as whether it be real—

There are usually reckoned three kinds of actionable fra-
-uds of this sort—1st where there is a sale with a war-
-ranty—This division seems however rather inaccurately pl-
-aced here—for where there is a warranty of the thing sold it cannot correctly speaking, be said to be a fraud but rather so much misrepresentation here preceeded the sale, for here the vendor voluntarily undertakes to make good all defici-
-encies— a warranty of the article after it is sold gives no satis-
-faction because it is gratuitous, & contributed nothing to the making of the bargain— but it has been a question whether a warranty before the bargain, was of any avail, or whether it be so only at the time of concluding it— the truth of the business is, that a warranty made with relation to a contract at a time during the pendency of the bargain, or while it is in agitation, is a warranty at the time of sale; but one made in any former conversation in the way of bargaining or not— is not operative as a warranty— Altho' it is commonly said generally true, that a warranty to operate in futuro is not good, yet it is otherwise where the thing to be warranted has a present quality which in all probability will continue of in usefulness any assignable portion of time, as for example a Clock— but to warrant a horse to be good at a future period would be void, because a horse has no such certain present quality of which

Of Contracts

future usefulness can with confidence be predicated

II. The second division is where one sells & affirms thing sold to be sound &c; but does not warrant it, or affirms in any other case without warranting so that imposition is the consequence - & in this case it is in some books said that where the affirment was ignorant of the falshood his ~~mis~~representations he does not thereby become liable for the imposition: but it is the better opinion, & late decissions have settled the point, that he is liable his ignorance notwithstanding —

III. The third Case is not direct but implied fraud, as if one sell for a full price a commodity which has a secret failing not obvious to the purchaser, & does not give information of the defect, this "suppressio veri, against which equity will unquestionably give relief - but it is still a question whether an action of fraud lies or not in such case. The better opinion however is that an action will lie, & this is founded not only on precedents both ancient & modern but on reason also — It is a maxim, but like most other legal maxims, liable to exception, that a man cannot grant what he does not possess - as for example the grant of a piece of land which one does not possess, is void unless the grantor become afterwards vested with the title, in which the grant would become good; for such grantor would be estopped from denying his own grant, & the title of all others being divested, the grantee will hold the land. The rule as laid down seems to be, ~~that~~ in order to the making of a valid grant, the grantor at the time of making such grant must have either an actual or potential interest in the subject of the grant; as for example, one owning a piece

Hob. 132 of ground may grant the grain or grass which it will at a future period produce, & the grant will be good - but a grant of the grain ~~that shall grow on lands~~ which the grantor shall hereafter purchase

But this rule reaches only contracts executed, for with executory contracts it is otherwise — For if one covenant that he will purchase & convey to the covenantee, a certain piece of land or other article of property, such covenant is binding — It is also a Maxim that Contracts must be certain; this is a very vague maxim, & Courts are ever unwilling to vacate contracts for uncertainty, & will always establish them if they can be understood —

Cro. J. 250
4 Sh. 69

When two or more become jointly holden in an illegal obligation, one which could not support a recovery, & one of them voluntarily pays the whole demand; if he does it by the request or with the approbation or privity of the other partner, the partner so countenancing such paym.t will be holden to pay over to his coobligor his share of the money so advanced; but if such paym.t be made by one without the knowledge or assent of the other, the payor would have no remedy against him — There are instances where parol contracts entered into by two will give a right of action to a third person for whose benefit the promise in such case was made, as when A. the promisor, engages to B. the promisee to pay a sum of money to C.; but in order to give C. a right of action on such promise against A., C. must be nearly related to the promisee for if C. be a stranger to the promisee, no right accrues to him by the promisor —

1.st Vent. 6, 318. 332 —

When one of two joint obligors pays the debt of both, his remedy against his coobligor is in Eng. by application in Cha. but in this State it is by writ of contribution in nature of an ass.t — There has been an illegal practice gone into of one of two joint obligors paying up the obligation, & then suing it in the name of the obligee & in that way collecting his share out of the coobligor; but this is contrary to principle, for the obligation being once paid is discharged — Upon the same ground it may be questioned whether an Officer after satisfying an Ex.n out of his own pocket can proceed to collect it — This practice however, does no harm & has not been questioned —

Of Contracts

Between the parties to a bargain something more is necessary to give a right of action, than a bare verbal proposal on one side & acceptance on the other; but this lays the bargain so open that either may by tendering a compliance on his part, bind the bargain & give himself thereby a right of action — And if a future day is appointed for the exchange of property but no writing is entered into or earnest money paid, still the bargain is inchoate only, & neither has a right, untill on the day appointed, one or the other, tenders compliance —

The great & much litigated point whether an endorsment on a bond takes it out of the Stat. of limitations, received a late determination in the Circuit Court upon a new ground. towit., that payment was a waiver of the Stat. right & not merely an acknowledgement of the indebtedness, or an implied promise to pay - to this point, & also of the doctrine of waivers in genl., vide Cowt. 471. 1st Ld Ray. 389. & 421, 2d Ld Ray. 838. Doug. 192, Gilbt. Law. Ev. 121. 127. 2d Vent. 151. 5th Burr. 2628. Cowp. 548 —

There are three kinds of future contracts or promises as Ist. Mutual promises, as when one promises in consequence & in consideration of the promise of another. as if A. promises to deliver his horse to B. on such a day, & B. in consequence promises to pay 50 Dols. to A.; here are mutual promises, & either of the parties is entitled on the day to an action without performing on his part, or alledging performance in his ~~last~~ declaration & that because the promise is the consideration on both sides, & the right of action mutual — IIly. a promise with a precedent condition, which is a promise to do such an act on a future day for a reward certain, as if A. promises ~~that~~ he will on such a day pay B. 50 Dols. if he B. will deliver him his horse, which B. promises to do - here the bargain is closed & only a future day appointed

for the delivery of the property - In this case when B. brings his action for the price he must state & prove that he did tender the horse at the time & place by the bargain agreed on; but if A. the vendee bring his action in such Case against B. the vendor, he has only to state the non compliance of B. for it was not incumbent on him A. to tender the money ~~un~~till the horse was delivered -

IIIly a third sort ~~of~~ promises are called concurrent promises this is where an inchoate bargain is defined, but no precedent condition is annexed, as when one says he will take 50 Dol.s for his horse, & the other says that he will give it, but the bargain is not closed & a future day is named for further conversation upon it - then at that future day the bargain being inchoate only, either party may close it upon the other by tendering compliance, & an averment of such compliance is necessary in a declaration by either against the other -

In cases under the second head where it appears by the nature of the Contract that the money was to be paid be-

1.t Vent. 177. - fore the service was to be done or the property delivered,
2 14. 147. it seems that no averment of performance is necessary
Hob. 88. by the party who demands the wages or price -

The warranty in a deed is a covenant which has been adjudged to extend only to saving harmless against the entry by title, & not against a tortious entry, unless the covenant be to defend against the entry of a particular per-

Hob. 34 - son in which Case the obligor is bound to defend against
Co. 6. 213 - the acts of such person whether legal, or tortious -

The question has been much litigated whether bare liability in a Bondsman is a sufficient ground of action against the Obligor in the Counter bond - Our Sup.r Court have determined that it is not, but the Court of Errors for:

have reversed the decision; & their decision is supposed to be in conformity to the principles of the common law – The authorities in support of the affirmative of this question are Cro. El. 53. 123. 5th Co. 24, Cro. J. 281. 3d Bulst. 233, 1st Keb. 392, 440, 464, 1st Vent. 35, 78, 261, Sal. 195. on the other side are cited 3d Wils. 13. 263, Cowp. 525. Doug. 569. in these latter cases the question comes up only collaterally in cases under the act of Bankrupcy, because such liability will not entitle to a share under the commission unless there be an actual damnification but the true reason of this is that no accounts are allowed under the commission but such as are liquidated & attested which is not possible in case of a bare liability – 3d Tak. 104. 642.

Though it is a general rule that parol testimony cannot be allowed to contradict a written agreement or obligation, still there are cases where circumstances dehors the writing, may be considered with the writing, as explanatory of it – & one instance which occurs in the Books is that of a Release of all demands, the general expressions of which have been allowed to be restrained by matter dehors the Release 1st Leo. 101. 3d J. 170.

When there are dubious expressions made use of in a writing, if they be such as will admit of no explanation they must be rejected: but if they can be understood in one of two ways, with equal propriety, the general rule is that they are to be taken the most strongly against the speaker – this is, however, always an exception, that when such doubtful expressions occur in the Condition of an Obligation, they are to be construed the most favorably for the Obligor: perhaps however, this is. Obligee may be here considered as the one speaking – 5 Co. 22.

Upon this ground is built a principle of the Eng. Law, that when the Obligor is prevented in any way from performing one of the alternatives contained in the Condition of a Bond, he is not holden to perform the other but the Obligation is gone — this in case where the Obligor is prevented from performance by the act of the Obligee, is undoubtedly right. but when he is prevented by the act of God, as the case may be, it should seem as if he ought not to be exonerated from performing the other alternative, & to this point is a Case in Sal. 170. but the current of authorities are the other way — But note. in Bosanquet & Puller 1st. Vol. 242 it is said that in case of the Obligor being prevented by act of God from performing one part of the alternative he is still holden to perform the other —

When there is a contract to pay money without specifying what currency. the lex loci where the money is to be paid & not where the contract was made is to govern — If one engages to pay in any particular commodity by a time certain, if he suffer the time of payt. to elapse, he is liable to pay the Cash & the Creditor may refuse the commodity — Upon this a question has been made what the sum in damages should be whether the price of the commodity at the time appointed for the payt. or the price at the time of bringing the suit. & our Courts have decided that it shall be the worth of the commodity at the time fixed for the payment — & this generally speaking, seems to be the rule in Eng.; yet the Courts there some time give damages for the detention which is the interest of the money, or value of the commodity after due — & in New York & Massachusetts this is always the case when the default of payt. is the neglect of the debtor:

2d. T. Wil. 88 — 1st. T. Wil. 396

but even this as the Case may be will be less than justice demands: but on the other hand when the fault is on the part of the Creditor, by refusing to take the commodity because offered a day too late, or the like, he ought to recieve nothing more than the narrow Connecticut rule will give him —

It is an agreed point that a written contract may be as well on several pieces of paper as on one provided such papers contain each parts of one & the same contract. —

Where the parties to a contract agree to postpone whether such contract be in writing or not, a mere parol agreement mutually made, to annul such

2d. B10 Park. Ca. 116 contract before the arrival of the time to which it was postponed, will be sufficient —

A bargain with a condition to have a right to rescind upon the happening of a certain contingency gives a right upon such contingency's happening

7. 6 Ter. Rep. 134 to restore the property, & resort to an action of Ind. Ass. for the price — but if the contract be not entirely rescinded but remain open, & the purchaser be injured in the contract, his action must be for damages confirming the sale —

6 Co. 45 Any security may be annulled by excepting a security of a higher nature, but another security

Cro. E 817 Cro. J. 579 of the same kind will not destroy the first, but yet if the 2d. Obligation be in the least degree better for the Obligee, as if a shorter day of paym.t be given or a joint Obligor added, such 2d. bond does destroy the first —

Of Contracts

It is a rule in the Eng. law that nothing may be plead-ed in bar to an action on Bond of less solemn nature than the bond itself i.e. a discharge under seal is requisite, for at common law no parol proof of paym. was admissible nor of accord & satisfaction, however by Stat. of Ann solvit ad diem & post diem is a good plea & proveable by parol. But to the above gen. rule there are exceptions, for parol proof of a tender in satisfaction is admissible at Com. law— Another exception is where the liability does not depend entirely upon the bond, but upon some subsequent wrong doing in the Obligor in breach of the Covenants or conditions of the Obligation, so that such act gives a suit, & in fact creates the liability upon the bond, in this case accord & satisfaction

6 Co. 43 for such wrong doing is pleadable to an action on the bond. Bond debts cannot be settled by arbitriment because the award of arbitrators will not be sufficient to extinguish the bond, unless the parties enter into bonds to abide judgt. in which case there would be bond against bond. In Connecticut the above com. law rules relative to bonds does not apply.

The gen. rules respecting parol evidence are the same in Chan. as at Law; but there are some cases the province of Chan. only, where the practice is not applicable to Courts of Law. As when ~~after~~ a written agreement is afterwards agreed by parol to be mitigated in its rigor; in which case if the party to whose disadvantage such supplementary agreement was made to operate, brings his bill for a specific perfor-

2d Vez. 299 mance of the written contract, the respondt. will be allowed to prove such after parol agreet.— And so too if the party benefited by such agreet. brings his bill to compell the other party to accept of such modified conformity, he may prove the parol agreet., but must shew that he has on his part performed—

Of Contracts – Chancery Powers over the

3 Atk. 388. Chan. will admit parol proof of omissions in writings whether fraudulent or negligent—

The powers of a Court of Chan. is twofold, first in compelling a specific performance of a contract when at Law only damages could be recovered & second by in giving relief when a Court of Law from the inflexibility of its rules cannot do adequate justice. A Court of Law relieves only by giving damages, a Court of Chan. by granting specific relief which it enforces by penalties, which if forfeited, the Court have power by coercive measures, extending to a commission of rebellion, to enforce—

The first hint respecting the power of a Court of Chan. to decree a specific performance was in the reign of Edw.d 4th: & in the reign of Hen. 7th we find a decree of the King: but afterwards in that of Jas 1st. Coke & the rest of the Judges declared that the power of the Chancellor extended only to giving relief in cases when the Courts of Law had no jurisdiction, or power to give relief; & vehemently denied the power of Chan. to give specific relief when a suit could be maintained for damages— but afterwards in the reign of Car. 2 this contested power of the Chan. Courts was fully recognized & established by common consent— In some cases when giving specific relief only, or directing a restoration of the prop.ty in question will not fully answer the demands of justice, the Court will in conjunction, issue with their decree, or as a part of it, an Execution for money to make up all defects of justice—

Of Contracts – Chan. powers over them

The rule for the interference of Chan. seems to be this, that if damages could be recovered ~~at Law~~ Chan. will give specific relief, but if upon the merits of the Case damages would not be recovered Chan. will not interpose, if however through a difficulty in matter of form the merits could not be tried at Law Chan. would notwithstanding give relief – Still if the affair be so circumstanced that a Court of ~~Chan~~ Law will give the same relief as Chan. could

1st P. Wil. 243 Chan. will not interfere – There are however some exceptions to these gen.l rules –

Fin. 5 – Whoever petitions for a specific performance must have performed on his part or have it in his power so to do that he may be decreed accordingly –

Whenever one is trustee for another Chan. will entertain a Bill for a specific performance altho that be in Cash; as in the case of an Executor who is as a trustee for an heir, of the residue of the personal Estate, but cannot be called on in a Court of Law in Eng. because such matters are within the province of the Ecclesiastical Courts, with which Chan. has in such Cases a concurrent jurisdiction – In Connecticut the Courts of law are the proper forums to resort to in such a case –

In all cases of trusts equity will interpose its relief, & that because in many such cases Law gives no relief —

When there is a contract entered into not contrary to the principles of morality, & after its inception, & before its completion it ~~is~~ by Stat. rendered in part

unlawful & consequently vacated at Law. Chan-
-cery will interfere & carry it so far into execu-
-tion as the Stat. will permit. as in the Case of
the restraining Stat. confining the term of leases
of Church lands to 40 years, Chan. would interfere
to compel a performance of a Contract for a
larger term, so far as to the extent of the time
allowed by the Stat. altho' a Court of law would
3d Bro. Parl. Ca. 389 give no damages, not being able to halve the
business —

The principle of a Court of Chan. in decreeing execu-
-tory contracts, is to consider what is articled to be
done, as actually performed — If money in gen. be
1st Vez. 175. articled to be laid out in land it will be in
2d Vez. 639 Chan. considered as land, & will follow the same
Sal. 154 rules, — be held in fee simple, or fee tail, & the inci-
3. P. Wil. 215 dents of remainder, reversion &c as to land so set-
1st P. Wil. 710 belong to it — but if the person whose property it
4 Bro. Par. Ca. 7 is, elect to consider it as money he may & any
intimation of such choice is sufficient — & all
other agreements in like manner may be in
Chan. considered as performed — But yet it seems
1st Bro. Cha. Ca. 236 that money situated as above will pass by will
without ~~without~~ the necessary formalities for pas-
-sing land as 3 Witnesses &c, and in such case must
be considered as personal property —

When parties contract to do a thing under a penal-
-ty agreed upon by themselves Chan. in general will
not interfere to decree a specific performance

but leave the party to his election either to perform the Contract or pay the penalty: but where it does not appear that the penalty was considered between them as an equivalent for a non performance, Chan. will interfere to compel a performance -

In giving relief against contracts Chan. have power either to vacate the Contract in toto, or in part only - In cases of this kind the party relieved is always decreed to refund to the party relieved against, if he has rec.d any thing in consequence of such vacated agreement; for Chan. does not punish fraud but only relieve against it - Mere unreasonableness or inequality in a Contract, unaccompanied with fraud duress, imposition, taking undue advantage of a persons situation, or ignorance, is not a sufficient ground to induce a Court of Chan. to vacate a contract or relieve against it - But where there is any the least fraud be it either suppressio veri or allegatio falsi coupled with
2 P. Wil. 203 such overreaching, Chan. will lay hold of it to vacate the Contract; tho' the same small degree of fraud if unattended with inequality in the Contract would not induce the Court to interfere - Our Courts of Law in this State have gone so far as to refuse to sustain an action a contract built upon clear & entire fraud - And in Mercantile contracts the least fraud makes void the contract -

Of Contracts – Chan. Powers –

Another ground of relief in Chan. is, the taking an
1. P. Wil. 310 – undue advantage of the situation or necessities of
another person; this is the ground upon which
Chan. Courts profess to go in relieving against un-
-cious Contracts – It is laid down as a Principle
that inadequacy of price only will not furnish
2. Vez. 422. 518 – ground for ~~the~~ relief in Chan., but that to authorize
such interference some fraudulent practices must
appear – & yet even a Court of Law in the barley con
Case, & some others have given damages in a suit on
the Contract, less than by the terms of the Contract pur-
-ported to be due –

Whenever a person enters into a Contract under
the influence of fear, provided it amount to duress
he may be relieved at Law by pleading the duress,
in bar of an action brought upon such contract;
but whenever such fear does not proceed from causes
which come up to the legal idea of duress, Chan. alone
can afford relief – 1. Duress in legal sense is of two
sorts, towit. duress per minas, & duress of imprison
-ment – Duress per minas is a threatening to destroy
ones life or dwelling; but it seems at least extre
mely doubtful, whether any menace of the des-
-truction of Personal property will am.t to duress
per minas – 2dly Duress by imprisonment, this too
is sufficient at Law to nullify any contract or secu
-rity altho made for a just debt; yet if such security
be for a just debt, it will not extinguish the original
contract, for after the ~~contract~~ security is vacated, an action will lie
such contract

3.d P. Wil. But in cases of fear which fall short of the techni-
294.— cal idea of duress Chan. will often relieve, & even the timidity of a fearful man will be considered — But where the fear is but the just reverence & awe which are due to parental authority, & the bargain made under its influ-
Vide Nob. p. 32.— ence for the good of the family, & not very unreasonable
1.st Vez. 19 on the part of the Son, Equity will not relieve again-
1. Atk. 11.— st it — Another ground of relief is where the fraud or imposition is upon third persons only, & this if in any degree the case will be sufficient to vacate the Con-
Salk. tract, & that too, even at the Petition of the debtor a
156 party to such fraud — neither can such contracts be confirmed by any after act — So also marriage brocage Bonds, are from principles of policy as well
1.st P. Wil. as justice vacated in Chancery, & are avoidable in
496 the hands of assignees as well as of the original holder & in the same manner are bargains with young heirs for their expectances vacated in Chancery — but these latter contracts are capable of confirmation
2.d Vez. after the death of the ancestor, provided it be
125 done understandingly; but there are cases where Courts will not allow validity to the confirmation, & that is when the party is ignorant of his right of avoiding the Contract when he makes such confirmation — When trustees make beneficial bargains to themselves out of the trust estate ~~they will~~ as in the Case of Executors
3.d P. Wil. 251.— they will be vacated in Chan. & that tho' at the time made
1.st Vez. 400 with the approbation of the heir — In Cases where equity will force a specific performance notwithstanding an agreed penalty on failure, (as some such Cases there are) the penalty is always directed to be waived — So in Case where one

party calls upon the other in Chan. to disclose a fact, if by such disclosure the party called upon would subject himself to a penalty, the one appealing to him must in his bill wave the penalty, or it will be demurrable—but if such penalty be by law due to a 3d. person the petition-er cannot wave the penalty, & of consequence cannot compel a disclosure—

Tho' it is a general rule that where an action is of that nature that it sounds in damages on-ly, Chancery will not take cognizance of it, yet if the parties assent to it that Court will proceed in such cases— In Chan. process it is necessary to support the allegation by the testimony of more than one witness, if it be denied by the Deft. on oath otherwise it is said there is but oath against oath In Courts of Law there is no fixed rule about the quantum of testimony, & in this State, where answers in Chan. are not put in on oath, the matter of the quan-tum of testimony is equally discretionary as at Law.

Where one has articled to sell land to another the agreement being mutual; either party may compel the other in a Court of Chan. to perform the agreement for a suit for damages at Law would often be an inadequate remedy—

It is a general, & very obvious rule, that Chan will not decree the performance of a Contract which if executed it would relieve against— But there are cases where they will not decree a performance & yet if it were performed it would not relieve ag-inst it— leaving the party to his remedy at Law if any he ha

and it is a question whether inadequacy of price alone is sufficient to induce a Court of Chan. to refuse carrying a contract into execution, tho' the better opinion is that very great & apparent inadequacy would be sufficient —

2d Bro. P. Cas. 415 — But if a Contract be equal at the time of contracting but by subsequent accidents becomes ever so unequal still the Court will decree a performance —

If a tenant in fee of money articled to be laid out in land & so considered as land, elect to consider it as money a bill in opposition to compel a specific performance will be dismissed —

1st Atk. 10 — 2d Stran. 738 — 1st Vez. 450 — Voluntary agreements without a valuable consideration (i.e. money or marriage) will not be carried into execution in Equity, but the volunteer must be turned over to his remedy at Law, where he will be allowed nominal damages only —

Parol contracts are of no validity either in Law or Equity without a consideration; & even if the Contract be reduced to writing & sealed, yet if it do not purport to be for value rec'd. it may be examined into, & if there be no valuable consideration it will not be carried into execution in Equity — But in Law they are not quite in the same predicament with such parol agreements, merely void, but yet no more than nominal damages will be given — But when the Obligation purports to be for value rec'd. it will be carried into execution both in Law & Equity altho' the obligee be a mere volunteer, for it is not in such case admissible to examine whether there be a consideration or not —

Of Contracts. Chan. powers &c

But tho' the parties to a Contract of the last description may not question its consideration yet 3d. persons may if affected thereby. & the decree or judgt. will be according to the result of such enquiry— According to this principle it should seem that single bills when they do not purport value recd., may be enquired into. but not if they do — Bonds for money do not usually carry value recd on the face but the condition always imports it—

Marriage settlements are deemed as valid against creditors as tho' money were the consideration of the contract, unless the settlement be evidently for the purpose of defrauding creditors - But those who thus take under a marriage settlement must be lineal descendants of the wife otherwise they will be deemed mere volunteers—

So volunteer Bonds in Chan. may be postponed to the claims of Creditors, but will be preferred to those of legatees — Vide also. No. 6. page 93—

The Defences against Contracts at Law by plea in bar are numerous. as 1st Coverture, 2d Infancy, 3d. Duress, 4th Usury 5th illegal consideration (which plea must state the illegality specially) 6th paymt. or performance, 7th release, 8th impossibility of performance (which plea must state specially such impossibility) 9th an Obligation of a higher nature, 10th a discharge before any breach. Of these defences vide ante passim. It is here to be noted that any of the above causes of defence appear on the declaration a demurrer will be fatal 11th Stat. of limitations this must in Eng. always be pleaded

Accord & Satisfaction –

A 12th Mode of defence is by plea of accord & satisfaction; that is when the parties voluntarily agree the one to give & the other to accept, & does in fact accept the thing stipulated to be given or done in lieu of the original demand – the general rule is that where damages only can be recovered whether the action be upon Contract or tort, accord & satisfaction is a good plea – But a debt or duty growing by bond, bill &c will not be barred

Cro. 6. 650 by a plea of accord & satisfaction; but when the liability or debt does not grow solely out of the bond, but by a subsequent wrong doing in conjunction with the bond, & which creates in fact the liability upon the bond, as where one is bound in a bond to keep

6. Co. 43. buildings in repair & fails to fulfil the condition, accord & satisfaction is a good plea – So also if the accord was made previous to the debt by the terms of the Obligation, becoming due, or the penalty, if a Bond, becoming forfeited, it may be well pleaded in bar – This distinction respecting debts by bond does not obtain in Connecticut, for here, accord & satisfaction is in all such cases a good plea – In all cases the thing rec.d in satisfaction must have a pecuniary value, for the accord must be with valuable consideration – love, affection

1. Rol. 128[2] or acknowledgement tho' declared to be in satisfaction

2. Mod. 88. will not do – It is of no consequence of how small value the thing accepted in satisfaction is provided it has a mercantile value, & was rec.d as a collateral satisfaction; for when any other thing is rec.d in satisfaction for money or money for something else, the Court will not judge of their comparative values; but when a small sum of money is rec.d for a greater, or a less quantity of any

commodity for a greater & of the same quality,
Stra. 426 it is no good accord, unless the paym.^t thus made
Cro. E. 193 was at an earlier day, than by the contract was
9. Co. 79
Co. L. 212 specified, or at a place more advantageous to
Yel. 125 the Creditor — So too the accord must be certain
So too the accord & satisfaction must actually be performed
& the consideration received, for a tender & refusal in
9 Co. 79
Cro. E. 193 this Case will be of no avail; tho' in all others it is
Stra. 573. deemed equivalent as a defence, to an actual reception
N.B. it should seem that where the bond is with a condi-
-tion to pay money, an accord may be pleaded in
satisfaction of the money or condition, yet it can-
2.^d Wils. 86 -not ~~in~~ in satisfaction of the Deed, because that must
Cro. J. 254 be discharged by something of as high a nature as
the bond itself — It seems to be a doubt whether
an equitable satisfaction only, would be a good
shewing in a plea of accord & satisfaction & in
2.^d Wil. 86. one authority it is expressly said that the accord
must be with a legal consideration, & that an equi-
-table one, such as the release of the equity of redem-
1.st L. Ray. 662. -tion to a mortgager will not do — but in another
authority it ~~is~~ asserted that such equitable conside-
-ration is a good & sufficient to supp.^ort a plea of
accord &c. however the gen.^l opinion seems to be
that a mere equitable satisfaction is not sufficient.
An accord must be in full satisfaction & not in
part only — & a mere restitution where any thing is
tortiously taken, without some compensation
will not be sufficient to suppor a plea
of ~~not ff~~ accord & satisfaction —

Of Awards

13th If an Award be a legal one it is as final as a judge-ment of Court & may be pleaded in bar in all Cases where an accord & satisfaction may; & where that cannot be pleaded an award can not; as in case of satisfaction in an action for the recovery of real property or concerning the title to it, & debts growing due by bond after the time of payt. & forfeiture of the condition, such bond being for money only; negotiable
6 C. 3- notes after they are negotiated follow the same rule—
There are some Cases which can not be submitted to arbitrement as all offences against the public qui tam actions & matrimonial concerns; & if any agreement either written or by parol be entered into concerning such improper submission, it is void—

Other Cases there are which may be submitted to arbitrement, but the award cannot affect the original ground of controversy; but if bonds be entered into to abide the award, such bonds may be enforced, as in case of an award relative to the title of land, for tho' the award cannot affect the title, still the arbitration bond may be enforced if the party refuse to convey the title in conformity to the award— The reason why an award cannot in Eng. be so made as to affect the title, is, that to pass a freehold livery of seisin or its modern substitute, a Deed, executed and delivered by the grantor or his atty, is absolutely necessary— & as the arbitrators can not be considered as the Attys of the parties a delivery to them of a Deed as an escrow to deliver over

Of Awards –

according to their judgt. will not do, & not being
attys. their delivery could not be the act of the parties
1 Rol. 244 as in presenti, & the maxim is inviolable that
a freehold can not commence in futuro – *But no
*Quere *vide 1st. Day 300. such maxim obtaining in this State, the title can't be
transferred by means of the parties delivering deeds
as escrows into the hands of the arbitrators to be by
them delivered to the party in whose favor they award
So Debts growing due by bond only for money, are not
arbitrable in Eng. tho' a bond to abide the award in
such case would ^unless by special bond^ be good – In this State Bond debts
are the proper subject of arbitration – All other mat-
-ters of contract except the foregoing exceptions & par-
-tial exceptions, are arbitrable, & the award whether
in writing or by parol is a final & effectual bar
to a subsequent suit for the same matter, if pleaded
Arbitrators have both legal & equitable juris-
-diction & may admit equitable as well as legal
proof – they can give specific relief so far as ^the title of^ their
award gives a legal title to the thing awarded; the
process to obtain possession must be in law or Chan.
according to the nature of the subject matter of the
award – Tho' an award is a sufficient bar against
a suit upon the original ground, still if the party against
whom the award is, neglect performance until af-
-ter the time prescribed for performance by the award,
he loses his advantage if any, & the Pltff is at his election
to proceed either upon the award, or have resort to
the original ground of action as he choses but not till the
time is elapsed. [~~& so quere unless the award be conditional~~] ~~[illegible]~~

Of Awards

When the Pltff would make use of the award to get his due, if the award be by parol, he may either bring his action of debt for the precise sum awarded, or an Asst. upon the promise contained in the submission, or an Ind. Asst. upon the implied promise to pay the sum awarded — So when the award is to do a collateral act as to deliver a horse, asst. upon the award lies, or trover for the horse, but if it be to do a something, the damage for the non performance of which cannot be ascertained, recourse must be had to the original cause of action, the time of performance being passed

Parol submissions may be revoked by parol at the pleasure of either party before the award is declared, & written
8 Co. 81 submissions by a written revocation — When there is a revocation of a parol submission the party revoking is not in Eng. compellable to pay any cost or damage but our Courts have in such cases sustained actions for the damage — But where bonds are given a revocation is a forfeiture of the bond — It has been the practice of Courts in this State, however, to chancer down such bonds not to the strict legal, but to the actual cost. — It does not clearly appear what the practice of the Eng. Courts are respecting such bonds, but they do not seem to come within the class of bonds chancerable by Stat. either in Eng. or here, & at Com. Law no bonds were chancerable —

When an action is brought on a bond, note or covenant to abide & perform an award, the sum to be recovered is the amount of the award only —

There is a mode of making a submission by rule of Court & this may be obtained by application to the Court tho' there be no suit pending, the Court appoint the men nominated

by the parties: & it seems that in Eng. the award is enforced, upon non compliance, by punishment for contempt of Court, a suit however upon such award will be supported — In this State it is the practice upon the report of the award in Court to issue execution as upon a judgement. The parties can either of them at pleasure revoke the powers of the arbitrators in such case. but such proceeding would be deemed a contempt of Court & the party punishable therefor, tho' no instance of the kind has occurred in this State —

It has been a question whether arbitrators are bound to go by their instructions in the mode of considering the subject submitted to them. but the better opinion is that they are —

It is a general rule that such persons as are by law able to contract are of capacity to submit to arbitrament, & that such as can rescind a contract can revoke a submission, & otherwise have the same advantage in case of arbitrament — Other persons are also in like manner bound by awards made between them & Infants &c. altho' such Infant or other privileged person be not — Executors & other trustees may bind themselves to abide an award concerning the cestui que trusts property, but such cestui que trust is not bound if they choose to disallow it — therefor it is not safe for an Executor to submit to arbitrament —

A husb. may without the concurrence of the wife submit to arbitrament any controversy relative to property which came by his wife, except real property —

Of awards

which he being incapable of disposing of but with her consent, he can not without her concurrence submit to arbitrament any question relative to the possession of it — & this analogy of contracts & awards holds good with few exceptions, throughout — One may submit to arbitrament the controversy of a third person & be bound by it tho' the 3.d person would not be by the award — But submission by attorney would be good —

It has been the subject of some litigation whether the submission of one partner would bind the other, but it is now settled that it will not, unless such power be given by the articles of partnership — but the bond of the one agreeing will nevertheless be forfeited if the other partner refuse compliance

There are cases where an award will affect third persons, & work a release of demands against them, as if several commit a trespass upon one, & afterward one of the trespassers is awarded to make satisfaction for the injury, the injured person cannot afterward have an action against the others for the trespass —

So in some cases 3.d persons are bound by an award as if a bailee submit the wrong done to his trust, to arbitrament, the bailor is precluded from bring[ing] his action against the wrongdoer, tho' he may against the bailee if he be not suited with the sum awarded; but if the bailor bring his action first against the trespasser, & submit it to arbitrament it does not preclude the bailee from recovering his particular damages out of the wrongdoer —

Of awards--

\+ As to the question who may be arbitrators the authorities differ, however it seems the better opinion, that such as are by law disabled to con-
Hard. 44. tract are disabled to be arbitrators; but perhaps
2d Mod. 226 Infants are not disabled by want of age merely
The method to set aside a parol award is, if the suit be an Ass. to plead the general issue & give the faultiness of the award in evidence, if it be Debt, plead nil debit & give evidence as before. If the suit be upon bond or Note the plea should state what the Note or bond was given for & plead no award i.e. no legal award. The Causes for set-
\- ting aside an award are, first, that the arbitrators have not observed their instructions, as going too far & awarding concerning matters not submitted to them, or stopping short & not considering all the subjects submitted. 2dly Corruption, under which comes gross partiality. In case of mistake in point of fact Courts of Chan. will some times interfere & nullify the award, tho' a Court of Law will not. But for a mistake in point of Law neither law nor equity will relieve.
A Court will not go into an enquiry what were the principles, but if it appear that the arbitrators up
\- on their own principles have mistook, i.e. have gone contrary to the principles upon which they set out even a Court of law will hold the award to be bad. The admission of improper testimony is some times a ground at law & perhaps always in Chan. to set aside an award.

Of Awards

Discovery of new evidence is sometimes a ground in Chan. to set aside an award, but never at Law – When the submission is by rule of Court there are some exceptions to the above mentioned rules, for in such cases all reasons which are grounds for a Court of Chan. are also grounds for a Court of Law to set aside an award, except that of new discovered evidence – Sometimes in submissions of this kind if the arbitrators set forth their proceedings at large in the manner of a special verdict, & a mistake in point of law / appear upon the face of the proceedings, the Court will take notice of it & set aside the award –

The thing awarded must be possible in a physical sense, & the same rules relative to this possibility obtains as does in contracts – The thing must be lawful which is awarded – So too an award would be void if it directed the party to do something out of his power, as to procure a title to land belonging to another, for the other party – but if the party against whom the award was, had a legal or equitable claim to the title of the lands in possession of such 3^d. person, the award would be good –

1st. Rol. 253. It must be mutual, i.e. the award must take notice of both parties, directing something to be done by both

1st. Rol. 250 It must be made all at one time & not at several times – It must be adventageous to the one in whose favor it is, as if one's Cattle be taken away wrongfully, & the award be only that they be restored, it is bad, but if a pepper corn by way of compensation be given with them, it will make the award good –

Of awards—

Where many things are submitted together to arbitrament, and an award is made of some & not of all, it will not be presumed by the Court that the arbitrators have not complied with their instructions, but if the fact be proved it will vitiate the award— If the arbitrators travel out of the submission, so that some part would be good & the rest bad, there is much doubt & contradiction in the books about the fate of the whole, whether void or not— But as Arbitrators are at their election whether to consider all together in a lump, or to consider each article by itself, it seems most reasonable to conclude, that, when they consider all together & balance one thing with another & in doing that, vary from their directions by omitting something, or including too much, the award is bad— But when they arbitrate upon each subject seperately, the award is void only as it respects those articles which were not submitted to them, & good as to the rest—*

Another class of cases is of this kind, that something is awarded which is nugatory, not being in the power of the party to perform, as if the award is that A. shall get B. to join in a conveyance of land to C. in whose favor the award is made; if B. have no title to the land & so cannot stregthen A.'s title to C. it is of no consequence to C. & so mere surplusage, & the rest of the award good— but if B. have a claim to the land & his concurrence with A. be necessary to make C.'s title good, the award will be void in toto, because it is an essential part of the award & yet out of the power of the party to perform it— N.B. a parol award of a collateral thing is not good because it cannot be inforced by assumpsit—

* By a release of all actions, causes of action are released, but a submission of all actions to arbit. does not comprehend causes of action— Co. L. 285.a.

Of Tender —

A 4th mode of defence is by plea of tender & refusal which exonerates from the the costs of the suit, tho' not from the debt itself — Under the Eng law tender may be well made at any time between the debt or duties becoming actually due & the commencement of the suit after which neither in law nor Chan. is a tender pleadable unless a rule of Court be first obtained granting liberty to the deft. to bring the money in, & tendering to the amount of the debt interest & cost, upon which proceedings will be stayed; & if the Pff will proceed it is at his peril, this operating as a legal tender in fav. of the deft — In this State the deft. may tender as well after as before suit brought, provided he tenders (if in the former case) the amt. in full of the Cost up to the time of tendering, as well as the debt & interest due — & upon plea of tender legally performed & duly proved, which plea must be with a profert of the money in Court, the Pff is entitled to the money, but must pay the Deft. his Cost from the time of the tender made — In Eng. a tender cannot be made upon a debt due by specialty, except at the time when it becomes due, but in this State a subsequent tender is good in such case as well as any other — Tho' tender of money duly made discharges the debtor from all liability to Costs of suit, it does not discharge the debt, where it was antecedently due — But if a mortgage be gratuitously made with a condition to redeem upon the perf. of a certain sum, a tender & refusal would be an extinguishment of the demand, there being in fact no anticedent debt due. In case of a pawn a tender & refusal so effectually vests the prop. that trover will lie for the article tho the debt will still be collectable —

Of Tender—

In Eng. if there be a tender & refusal upon a single bond ~~within~~ for the payt. of money & a defeasance be upon a separate paper purporting that such Bond shall be void upon the payment of a less sum- all liability ceases upon such security, for the penalty being saved by the tender, no action can be brought—for the recovery of the true sum due, specified in the defeasance— So too if the bond be that the obligor shall do a collateral act as to stand to an award to be after made or the like, a tender of performance takes away all right of action upon the instrument for non performance — how ever it seems that in all such cases an action of Indeb. Asst. for money had & recd. will entitle the suitor to his money but will subject him to Cost— [this law is not applicable in Connecticut.] But a penal bond for money with a condition attached to it making it void upon the payt. of a less sum, will not be so totally destroyed by a tender & refusal of the sum in the condition named, for tho' the penalty is saved the sum in the condition mentioned may still be recovered in a suit on the bond but with payt. of Cost by the Pltff— No good reason appears for this distinction. A tender will be of no avail except it be for a debt or duty certain; it will not for instance, do for an asst. & battery Slander &c.— But by Stat. in Eng. a tender is allowable as amends for an involuntary trespass, & provided ~~that~~ the tender was, in the minds of the triors sufficient, the Deft. would be entitled to his Cost & tho' Pltff to the money tendered, as in matters of contract. So too a Magistrate who in the execution of his office becomes liable may by Stat. tender amends— These are the only instances, & these are not allowed of in this State, we having no such Statute—

Of Tender –

It has been much litigated whether a tender can be made upon a Book debt, or as they term the like species of demand, a quantum meruit, but it seems now settled that a tender may in such case be made. Tender of a duty certain is as good as of a debt certain. After a tender & refusal, the debtor must always keep the money by him, to pay upon any demand, as well as to bring into Court in support of his plea. for if there be after tender & refusal, a demand made of ~~it~~ the money, it must be paid over, or else the whole benefit of the tender is gone, unless it be to save interest from the time of the tender made to the time of the demand. but even this is very doubtful – By a tender & refusal the debtor becomes a bailee of the money to the Creditor, & is liable in the same degree as a naked bailee & no further – & tho' a suit is allowed for the money upon the note or other obligation, still that is in favor of the debtor, because it gets the obligation out of the creditor's hands & lodges it on file – When a debt is payable in any cumbersome or perishable articles, a tender of them at the proper place entirely exonerates the debtor from all demands; for he is not obliged to charge himself as bailee of such articles, & if he does do it, he has a claim for keeping them if expensive & may have a lien upon them for his pay – But such tender vests the property compleatly in the Creditor, whether present & refusing the articles or not, so that after demand he may have trover for them in whatever hands they are –

Of Tender —

Where ever the right of tender is personal only, the tender must be made in person, or by some one particularly authorized by the person, & in his life time. As if a feofment be made with condition that if the feoffor pay a sum of money to the feoffee, he shall have a right to reenter, the tender must be made by such feoffor in his person or by his att^y in his life-time — But in all other cases, other than of such personal nature, any representative or privy, as heirs, adm^rs Exo^rs &c may make the tender — So any person who is interested in the condition dependent upon the tender may make it tho' not a privy to the person who was to have made the tender — But a tender by a Stranger is void except in behalf of an Idiot —

In order to make a good tender there must be an actual offering of a sufficient quantity of money, & not a mere declaration of a rediness to pay — It is not absolutely necessary to count the money, so it be that there be proof of its being enough — for it is the business of the Creditor to count it, & if there be more than enough, for omne majus continet in se minus — In England the tender must be either of Eng. money or of such as is made current by proclamation, & such tho' it be base is a legal tender — In this State any money (gold & silver) which is current whether by proclamation or not is a legal tender, but not Copper coin except to make change — It is in the Books said that Bank bills is a good tender if the Debtor offer to get gold & silver, for them & it is declined —

If money tendered, after tender becomes of less value by depreciation, the Creditor must suffer the loss for the Dyer. 181. same money brought in to Court by the Debtor will Dav. 27 exonerate him — And it seems that if the Creditor puts it out of the Debtor's power to tender the money

Of Tender

after it becomes due, by leaving the realm &c; & it is in proof that the Debtor shewed a readiness & desire to tender, he is entitled to all the benefits of a real tender & refusal — If counterfeit money be tendered & accepted, at Com. Law the Creditor could not come back upon the Debtor unless it was a fraud in the Debtor, he knowing the money to be bad — But in Connecticut we have a Stat. which enables the ~~the~~ person so receiving bad money to come back upon the payor, provided he do it within one year

If there be a certain place of payt. fixed by contract a tender to be good must there be made; & if there be a time & place, then the tender must be at the place & at the last convenient part of the time fixed, unless the creditor be present at an earlier part of the time — & if the payt. be to be made at a particular place, on or before such a time, then the tender ~~then the tender~~ may be made at any time before the last day, provided the Debtor find the Creditor at the place, but otherwise not till the last convenient part of the day mentioned, so it be before sun set — When the place of payt. is fixed, but no time set the tender must be at some time when the Creditor is at the place unless the debtor give him due notice of a particular time beforehand in which case the tender would be good tho' he were not present — But if the payt. be to the person, & no place be fixed, then the tender must be to the person of the Creditor wherever he is; if within the realm — To this rule there are however exceptions — for money answering for rent may be tendered on the land whence the rent issues, but perhaps here is by custom a place fixed —

3d Tender

So money due as a redemption for a Mortgage when no place of paymt. is appointed may be tendered at the house of the Creditor, or at any other convenient place of which the Debtor previously gives notice — When there is no place fixed for the delivery of cumbersome articles, the Debtor may tender them at the place of the Creditor's residence at the time of the contract made but if in such case the Creditor has removed to no greater distance than he resided when the contract was made, apply to the Credr. for directions & tender accordingly, if those directions be not to transport the articles to a greater distance than to the place of his residence when the contract was made; in which case, or in that of the Creditor's being at too great a distance for application, tender at the former place of abode — But there is an exception as to mercantile transactions, for there a tender at the Shop, or factory of the Debtor, is always good — So if the Creditor have no fixed residence, an information of the place & time intended by the Debtor, to the Creditor is necessary. This too, perhaps would be necessary if he had a place of abode, if no place of delivery was fixed — N.B. It is said that a tender of Costs after a bill filed in Chan. would be good —

A tender may be made to any one in whom either as party or privy, the right to the thing tendered
Dec. 2 is, as to an Exr. &c — In case of an assignment if it is as convenient to tender or pay to the assignee

as to the assignor he must tender to the assignee, but if not, it is the duty of the assignee to direct the debtor where to tender it & to whom — if not, he may tender to the original oblige — a tender to a stranger is not good — And if the Condition of a Bond be to pay money to a Stranger, a tender to him & refusal will not release the penalty —

Cro. E. 755 —

After a tender is made, a demand & refusal must be a reasonable one in order to vitiate the tender: i.e. it must be made to the person making the tender, & at his usual place of abode, as he is not supposed to carry the money about him —

In pleading a tender, every requisite which is necessary to the validity of a tender must be set forth or the plea will be bad — For authorities upon the subject of tender vide Co. L. from 202 to the 212th page 5. Co. 115, 2d P. Wil. 378, 2d Rol. 613. Latch 70 — 3d Lev. 104 ——

Stat. of frauds & perjuries —

A 15th Defence is the Stat. of frauds & perjuries — If an action be brought upon a contract upon which the Stat. of frauds might attach, & it does not appear by the declaration — that the contract was made according to the terms by that Stat. required, it will not do to demur to the declaration but if the Deft. would avail himself of that Stat. he must plead it — As to the first thing in the Stat. mentioned that no Exr. shall be charged to answer any deficiency out of his own estate without a Note

or memorandum in writing &c. It seems the better opinion that if he have confessedly assets enough in his hands to satisfy all demands against the Estate, that the promise is not within the Stat., for the Exr. is not in danger of being harmed by his undertaking —

As to the 2d. provision of the Stat. that no person shall be charged with the debt, or default of another person &c. — the most general rule seems to be, that if the Deft. came only in aid of the person trusted, so that the vendor would have remedy against both upon their several distinct engagements, that such an undertaking is a mere collateral one, & void if not in writing. But where the whole credit is given to, or the whole liability devolves upon the promisor, & no liability remains upon him who recd. the article the promise is original, & so not within the Stat. It seems however, that in one Class of Cases there is an exception to the foregoing rule; & that is when in consequence of the promise the promisee loses a hold upon the the Debtors property, as where he in consequence relinquished a lien upon the

3d. Bur. 1886 Debtors goods, the promise was held not to be within the Stat.; & it is presumable that the consequence would be the same if the lien was created by attacht. instead of operation of law —

The authorities upon this part of the Stat. are 1st. Sal. 207. 5th. Mod. 213. Bul. N. Pri. 281. 2. 1st. Wils. 305 — 2. D. 94 2d. Ter. Rept. 80 —

3d. The third thing noticed in the Stat. is agreements in consideration of marriage – And upon this it has been sett.d that promises to marry are not within the Stat. – for it relates only to promises in consideration of marriage, as to pay money; make a sett.t &c. Upon this Subject, vide 1st. Stra. 34. 2d vent. 361. 1st. P. Wil. 618.

4th. The fourth clause relates to sale of lands or any int.t in them &c. In this part of the Stat. there is a difference between our Stat. & the Eng. in this, that a parol lease will be good in Eng. for 3 years but here it is not, any further than this, that the Lessee is not considered as a trespasser, & on the other hand no rent can be recovered upon such lease, tho an ass.t for the worth of it would lie – but Chan. will decree a specific performance of a parol agr.t about lands when it has been carried into execution on one side, or even but part carried into execution; & our Courts of Law give damages for non compliance in such cases – the person taking advantage of the Stat. is never allowed to profit by his own non compliance – on this part of the Stat. vid. 1st. L. Ray. 82, 1st. Atk. 12, 1st. P. Wil. 770 – As to the 5th. clause relative to contracts not to be carried into effect under a year, it has been sett.d that where

Bur. 1278 1st. Blac. 353 Sal. 280 such agre.t depends upon a contingency, which contingency may happen within a year, a note in writing is not necessary; but if from the whole tenor of the agre.t it appears that it was to be performed after the expiration of the year a note in writing is necessary

1st. Vez. 221. 223. A promise to pay for an article sold by public authority need not be in writing

1st. P. Wil 618 – A Parol promise that an agreement shall be put in writing will not be aided in Chancery – But a parol promise to make a defeazance to a deed already given, would be decreed in Equity = As to what shall be considered a sufficient signing, it has been sett.d that if the name of the party to be bound thereby appear on any part of the writing it

1st. Vez. 6 1st. Wils. 193 – 5th. Vin. 361 – 2d. P. Wil. 65 is sufficient, provided it appear that it was the parties intention that such person should be bound, & an acceptance be shewn on the other side. So too, tho' he did not sign if the other party was by his means drawn into sign. So too a letter has been held to be a sufficient memorandum in writing.

For authorities upon this whole subject vide Pow. on Con. from 270 to 312. & the authorities there cited – as 1st. P. Wil. 714. 3d. Atk. 4. 1st. ver. 159. Pre. in Chan. 526 1st. Cha. Ca. 135. 1st. ver. 151. Pre. in Cha. 402. 3d Atk. 504. 1st. P. Wil. 770. 1st. ver. 375 201. 2d P. Wil. 65. Pre. Cha. 208. 1st. Vez. 441. 2d. Vez 229. 2d vern. 363. 373. 455. Pre. Cha. 519. 1st. Vez. 297 Pre. Cha. 560. 1. Stran. 738. Atk. 626. 6th. Bro. Par. Cas. 45 ——

Of Estates testate & Intestate —

upon the decease of the owner intestate, all real estate descends immediately to the heir at law, & the personalty to the Exr. or Admr. — The real Estate is chargeable with no debts except those which are specialties binding the estate in the hands of the heir, as well as the obligor himself — but for specialty debts, the heir is not properly liable but only the real estate in his hands; for after that is exhausted he cannot be any further called upon — If the heir elects to redeem the land he has a right so to do, without being subject any farther than to the amount of the value of the land — At common law if the heir aliened before suit brought, the lands were freed from the specialty demands, neither could the heir be subjected; but by Stat. of Wil. & Mary if the heir alien, he is made liable to the extent of the value of such aliened land but no further — By the same Stat. lands in the hands of a Devisee were made liable for specialty debts, before which Stat. they were free of all lien or demands whatever on account of the debt of the devisor* — But the personalty which goes into the hands of the Exr. or Admr. is liable to all kinds of debts whether by specialty or by simple contract, & so far as the personalty goes the Exr. is liable for the debts of the testator, & no further; provided he observe to pay Creditors according to their rank as to the nature of their demands: but if he pay a debt of a lower kind before all of a higher nature be discharged, he is liable pro tanto out of his own estate, but of debts of the same kind those who

* N.B. the heir & the Devisee may both be sued at once by the Bond Cr. as corresponding East's Vol. 4th. 485 —

first call for them are to be first paid, & no average at Law is observed - If the specialty creditors come upon the personalty & exhaust it. the simple contract debts must go unpaid tho' there be ever so much real property, unless by application in Chan. which will in such case, put such simple contract Creditor into the place of the specialty creditor, who had exhausted the ~~realty~~ personalty. & permit him to take the realty to the amount of the personalty so by such creditor exhausted - And when Chan. gives this aid the decree is that all the simple contract Creditors are to be allowed to share alike who will exhibit their claims & get them allowed in Chan. - But if an Exr. does not pay according to the assets in his hands, & becomes a Bankrupt, the condition of the Creditor is the same with those of other bankrupts, unless Chan. for his bad conduct has previously compelled him to find surety, in which case such surety may be liable, as are those of administrators, who always give bonds - If, after the Exr. has discharged all the the debts of which he had any knowledge, & paid off the Legacies, another debt should appear, the Exr. must be liable for the debt, but may indemnify himself out of the Legatees, each being obliged in such case to contribute his part in such indemnification - And by application in Chan. the Creditor may if he choose come immediately upon the Legatees without calling upon the Exr. - It is a question whether if there be an Admr. with a bondsman, the Credr. must not, first sue the bond before he can

come upon the legatees in the mode mentioned; but if the bond fail he unquestionably could come upon the legatees – There are Assets in Equity which are not so at Law, as for example, an equity of redemption which tho' of no consideration in law, Chan. will compell an allowance of it, & let in all the Credi-tors, whether specialty or simple contract to an equal share, without distinction of rank – But when there is a decree to be bring legal assets into money the same priority is observed in equity as at Law – As, ex gra., if one charge his real estate with his debts, authorizing his Ex.rs to sell the land for the purpose of discharging the same: in this case if the Ex.r refuse to comply with such direction, a suit at Law will be of no avail, for lands are not assets untill brought into money, & the Ex.r cou'd plead plene administravit to such a suit: but by an application in Chan. such Ex.r is compella-ble to sell the lands, & the money arising from the sale is legal assets – If one gives lands to his Executor to sell & pay his debts, the Ex.r is then com-pleatly vested with the fee of the land, but Chan. will compell him to sell, or otherwise to dischar-ge the debts to the value of the land; this money when raised is legal assets too – So one may devise his lands ~~to~~ upon condition that the Devisee will pay his debts; in this case, if the Devisee accepts the devise he is certainly holden at Law, if not in Equity, to pay all the testators debts whether they surmount the value of

the land devised or not - If the devisee enters upon the bequest & pays part of the debts & afterwards abandons it, the heir has a right to take the property, but if he too abandons his right, a Court of Chan. will in such case interfere & compell the devisee to go on, & pay the other debts, or sell the land & turn out the avails. When the devisor empowers the Exr. to sell his lands for a particular purpose, as to raise portions for daughters, the money arising from the sale is not assets in the hands of the Exr., but this portion is liable in the hands of the daughters for specialty debts, as lands in the hands of any Devisees since the Stat. of Wm & Mary are - a reversion, if it comes into the hands of the heir, is liable as far as other realty is, for the debts of the deceased - A chose in action is not assets in the Exrs. hands untill reduced into possession; & if a suit be brought against an Exr. having nothing but choses in action, he may plead plene administravit, (unless by his negligence he has suffered those demands to be lost) & Execution will not be issued against him untill he has recovered the property in action; when it will issue for so much only as the recovery amounts to - Profits of the personal estate, as of a leasehold estate, being what remains after the rent is paid, are assets in the Exrs. hands, so is the Int. arising from the testator's money - But the Exr. is not obliged to acct. with the Creditors for the profits of the Estate for the first year, nor to allow Interest upon the legacies untill the end of that period - If an Exr. or Admr. (for the duties are the same)

[marginal notes: law ... leased ... in correct ... & the pay be a surplus but this in uple ... executor ... to Exr. ... debts & legacies -]

recover damages for injuries done to the estate of
the deceased, either before or after his death, such dam-
-ages, as well as debts recovered are assets in his hands.
For an injury done in the lifetime of the testator the
Exr. must sue as Exr., but for torts committed upon the
estate, subsequent to the testator's death, he may
sue either as Exr. or in his own name only – Assets
may cease to be so, by accident, for an Exr. is not oblig'd
to make up any such loss as was not incurred by his
negligence or wrongdoing – Goods which the testator
had as trustee are not assets in the hands of the Exr.
for he has nothing to do with the personal trusts of
his testator – & in case of the death of the cestui que
trust at the same time, it has been a question
whether such goods should be assets in his hands either,
but in Chan. it has been determined that they shall be.
An ~~Exr.~~ Admr. is first to pay the debts of the deceased in
their order & then distribute the residue if any to the
next of kin according to the Stat. of 27th Char. 2d reser-
-ving nothing to himself – An Exr. in like manner
is to pay the debts & then, if there be any legacies
Exe he must pay them specific legacies first, & then
-ple general pecuniary ones, & if there be a residua-
wit- ry legatee, then the remainder to him: but if
Je ; there be none, then as the law formerly stood the
rais Exr. was entitled to the whole residue: but in more
land modern times, Chan. compells Exr. to make distri-
his a -bution of the residue to the next of kin according
he is to the rules prescribed to Admrs. in the Stat. of Ch. 2
all t. but with this exception that if the Exr. had

Of Estates testate & Intestate

no legacy left him by the will, or such an one
only as evidently appeared not to be given with a
design to cut him off from the residue, as a gold ring
or the like, he still ^was^ entitled to the residue after pay.
1. P. Wil. of Debts & legacies — But if the Exr. have a legacy left
9, 550. him by the will, he must distribute the residue — Chan.
3. P. Wil. 40. will, however, admit parole proof to shew that it was
Stra. 568. Pre. Ch. 27. 91. not the testator's design by giving the legacy, to deprive
160. 2. Atk. the Exr. of the residue — But this kind of proof will not
220. 3. Atk. 226 — be admitted on the other hand to shew that it was not
1. Ves. 473 — the testator's design that the Exr. should have the residue
1. Wils. 331 when he left him no legacy — But tho' generally speak
-ing a legacy cuts off the Exr. from the residue, yet if
there be two Exrs. & one has a legacy & the other none by
the will, they may still be intitled to the residue,
1. Bro. 20. for the legacy given is considered as only preferring one
325 — of the Exrs. to the other, & not given for the purpose of cutting
either off from the residue — With respect to the debts
due from the Exr. to the testator, it is said by the Eng. law
(a distinction [illegible] Exr. & actually renounced before the Ordinary. Sal. 307 [illegible])
8th Co. 136 — yers that by the appointment, the debts are released
1. Rol. 934 (but otherwise it is if the Debtor [illegible] Exr. formally refuses before the Ordinary [illegible] appointed Sal. 307 — [illegible] Ordinary [illegible])
even tho' the Exr. refuse to act, ^ but this idea is incorrect
Plow. 1806 for such debts are assets in the hands of the Exr. for the pay
Yelv. 160 — ment of Debts, & perhaps ^too^ of legacies; true if there be a surplus
Pre. Ch. 373 left, which would go ^to^ the Exr., the debt is released, ~~for~~ but this
Cas. temp. Talb. 240 is no more than a consequence of the old principle
Cha. Ca. 292. Yelv. 160 that the whole of the residue went to the Executor —
Sal. 306. The truth is, the action is released by appointment of a debtor Exr. but
such Debt will be deemed assets in his hands to pay both debts & legacies —

But in case the Exr. was so indebted, & had a legacy left which would cut off from him, the residue, it is at least questionable whether he would not have to make a distribution of so much as the debt amounted to; for the same reason the doctrine may be questioned in Connecticut where the Exr. never has the residue –

3d Bro. Ch. 110 in this Case it was so decreed & the Exr. holden to be a trustee to the next of kin for such sum –

1st Sid. 79 Sal. 306

An Admr. by his appointment is never released from any debts due from him to the intestate, but must account with the Creditors or representatives, for the same.

It has been determined that an Admr. is a good witness in any controversy about the estate of the intestate, for being a mere trustee, he is not personally interested* – But an Exr. is not an admissible witness in such case, because he is supposed to be interested; & in some cases he doubtless is, tho in others it should seem that he is not any more than Admr. is – N.B. When a person is entitled as next of kin to a distributory share, this right or propy. vests immediately in him upon the death of the former owner, tho' the distribution is not ordinarily made under a year; & if he die in that time his Exr. is entitled to ~~it~~ such share tho it never came actually to the hands of his testator –

* Not however if he be a party on record & liable of course to the Costs in the first instance 9th East. 7 –

Of Legacies – Where one devises his real estate to a person in trust to pay his debts without making his Exr., the Devisee is compellable in Chancery to sell, & the avails of the sale are equitable assets –

Of Estates testate &c — Legacies —

In case the Devisee should proceed to the payment [are to] without compulsion, it is apprehended that if no pre- [& it is] ference was given by the Devisor to any particular [the testa] creditor, or class of creditors, such Devisee would be [min] at his election whom he should prefer in the order [tl be] of payment, or whom he would suffer to remain unpaid if there [sent] was not enough of such devised property to satisfy the whole. There is no specific form of words necessary to the constitution of a legacy, but any thing is sufficient whereby the intention of the testator can be discovered to give a legacy, by the language of the

Pal. 416 Will — It seems to be admitted that when the lands go by descent, if the specialty Creditors are paid out of the personalty, so that the Legatees are deprived of their legacies, they would be allowed to come in upon the real estate pro tanto; but not when the realty is devised — But when the lands are devised to pay debts, & instead of the land's being applied according to the devise, the debts be paid out of the personalty, the legatees & even those who are entitled as next of kin to a distributory share of the residue, are placed in equity, upon the same footing as the Creditors were, to the amount of the debts so paid, & consequently be entitled to the money arising from the sale of the

3. P. Wil. 922 — lands so appropriated —

When one gives a legacy, & afterwards in the lifetime of the testator, the Legatee dies, the legacy is lapsed, & so will not go to the representatives of the Legatee but revert to the testator — & whether such lapsed legacy shall go to any particular person or be distributed, depends upon the will; if

Stra. 820 there be a residuary legatee the legacy so lapsed will go to him, otherwise it will be distributed — There are some cases in which a legacy will lapse altho the

the legatee survive the testator, as when the legacy is by the terms of it made due at a future day & upon a contingency; & whether such legacy be a vested interest in the legatee, or a contingent one, & liable to be defeated & so the legacy lapse depends upon nice distinctions arising in part out of the variant rules adopted by the Courts of Chan. & the Ecclesiastical Courts, who have cognizance of all questions concerning legacies — If a legacy be given to one to be paid at twenty one, or any other particular time, or other words purporting paym.t in direct terms, it is a vested legacy & will go to the representative of such legatee, if he should die before the day of paym.t arrives — But if the legacy be without using direct terms of paym.t; as if it be thus to A. I give fifty Pounds when he shall arrive at 21 years of age the legacy is not vested, & if A. die before 21, it is lapsed. This is the Ecclesiastical rule & it holds good in all cases except the legacy be charged upon lands in which Case it being a matter wholly of Chan. jurisdiction the above distinction is disregarded & all such legacies ~~where~~ as are above mentioned made due at a future period are lapsed by means of the death of the legatee before the day of payment — & when such legacies are charged upon both real & personal prop.y they are lapsed quo ad the realty but as far as they are dependent upon the personalty the above mentioned distinction holds —

3.d Bro. Ch. 110 in this Case it was so decreed the Ecl holde lie to

3 P. Wil. 113. 2 Atk. 320. 3 Atk. 203. 2 P. Wil. 610 —

Vide also this whole subject Co. L. 237. a. note 152 —

Of Estates testate & Legacies —

There has been much dispute when legacies are to be taken to be accumulative & when not; but it is now settled that when in the same will the testator has in *totidem verbis* given the same sum to the legatee in more than one place, it shall be taken to be a mere repetition; but when different sums are given in different parts of the same instrument, or the same sum to be paid in different kinds of property to the same person; or different or the same sums both in quantity & kind given in different instruments, even tho' one be a codicil to the other, or it be in different Codicils they shall be taken as accumulative legacies, & not as mere repetitions of the same bequest; unless it
1: Bro. Ch. 389 appears by some circumstance that the intention
of the testator was otherwise, which is always to govern.

Whenever a legacy was given by a Debtor testator, to his Creditor, it was formerly holden, that if the legacy was equal to or greater than the debt, it was a satisfaction of the Debt, it being presumed that the deceased meant it as a pay^t. & not as a bounty.

1st P. Wil. 410 — This rule has in more modern times been evaded & suppressed
2d do. 555.616. in every indirect manner possible, tho' never openly &
3d do. 227 — 2d Atk. positively denied to be law by the Courts of Chan. to which
350 — 3d do. 96 — this matter in Eng. belongs — the rule is thus narrowed al-
1st Vez. 521 most to nothing, for now in order to work an extingui-
2d do. — 409.636 — shment of the debt, the legacy must in every thing
1st Bro. Ch. 129 compare with the terms of the debt — in specie, time of pay^t
425 &c & in short must be such as makes it evident that
389 it was the testators intention to pay the Debt by such bequest

 Legacies -

In this State it has been decided at Law not to be a satisfaction -

Tho' it is a general principle in the Eng. Law that interest is allowable upon all debts of whatever kind after the day of paym.t whether it be mention in the contract or not, yet with respect to legacies it is not so - If there be a time set for the paym.t of the legacy, no interest is demandable till the time is elap-

Sal. 415 — Prem. Ch. 11. 161 sed, nor then till a demand is made. There is however an Exception in favor of Infant legatees whose legacies draw interest after due tho' not demand & if such infant legatee be the Child of the testator, & have no other means of support provided by his parent, such legacy will draw Interest from the death of the

2.d Vent. 346. 2. Atk. 329. 3. Atk. 101. testator - whether any time be set for the paym.t of the legacy or not. but under such circumstances only will such legacy draw interest untill payable - But whenever the testator directs interest to be paid upon any legacy whatever, his will is to be obeyed - When there is no time fixed for the pay.t of legacies they do not draw interest the first year, nor then untill demanded, unless in the case of Infants who need make no demand in order to

3.d Wil. 126 entitle them to interest after the year, tho' before that time he is not entitled to it, unless it be the sole pro-vision made for his support by his parent, as before mentd. There is however this exception to the foregoing pend.g rule that if the legacy it self carries or bears int. as a note bond on int., Stock in the funds or the like, or if it be char-ged upon lands out of which issues rent, or the like, in which case the legacy always carries interest from the death of the testator. - Such interest as accrues upon legacies which

in the hands of the Exr., & not due to the legatees, goes to the residuary legatee whether Exr. or other; but when there is no residuary legatee either appointed in express terms or by implication, the interest sinks into the mass of the estate & is to be divided among the next of kin. =

= Specific legacies, may consist of any thing particularly marked out by the will; even it may be money, if described to be in a certain place or the like. Specific legacies tho' subject to the demands of Creditors are preferred to the pecuniary legacies. & all the latter must go to satisfy Creditors before any of the Specific legacies can be touched; so too the pecuniary legacies must go to pay off the specific legacies if such specific legacy be of a nature to be aided, or procured by money. - on defect of assets to pay debts, all general, or pecuniary legacies abate, & the deficiency is averaged among them, but in case of having resort to specific legacies for the discharge of debts, it seems doubtful whether the Exr. may take the whole of any one or more such legacies ad libitum, to raise the needed money, or whether all such legacies shall abate in the manner of an average, as is the Case of pecuniary legacies — 2 P. Wil. 422

And if the specific legatee by any accident loses the legacy while in the hands of the Exr. it is to him a total loss & has no demand for its value upon the rest of the estate — The legatee has but an inchoate right to a legacy untill the Exr. assent to it, so that

the Exr. may use an article which is given as a specific legacy in the will, liable however to credrs. for it to the legatee, provided there be assets enough in his hands to pay off all the debts & specific legacies, it is however the better opinion that in case of the failure of assets he may take which he pleases of the specific legacies to supply the deficiency, & deliver over the residue entire to the legatees - But if the Exr. once assents to the Legatee's taking his legacy, his right becomes absolute against the Exr. in whatever stage of the business it is obtained - A devise of lands is a specific legacy & tho. this be liable for debts it is not to general legatees. For tho' legatees are entitled as well as simple contract creditors to come in pro tanto upon the lands descended to the heir, when the personalty is exhausted by the specialty Creditors, yet they cannot upon the lands devised, for such devise is in the nature of a specific legacy, which never abates in favor of a general
1. Atk. 505 Sal. 416 legatees, nor, as is the better opinion, do such legacies abate in favor of one another - But it should seem that in case of but little real estate remaining to the heir & not enough to pay the debts, the greater part being given to a devisee; then the devisee is the person for the Creditors to call upon, & not the heir, such devisee being in place of the heir; perhaps however even in such case the heir would be liable to the Credrs. if disposed to call upon him, to the amt. of the assets in his hands, & the Devisee for the residue -

Of Estates testate &c - Legacies

There are some cases, by way of exception, in which a pecuniary legacy will be preferred to a specific legacy, when it is the evident meaning of the testator that such legacy should at all events be paid - As if the Testator give all his Estate in specific legacies & then give a general legacy to be paid out of his Estate at large - in this case the intent being manifest, such legacy must be paid - An Exr. upon paymt. of a legacy has a right to demand a security of the legatee to refund his average, if there should eventually be a deficiency of assets for the paymt. of the debts & other legacies and it seems that, if he neglect this precaution, he is in Eng. holden personally liable without redress against such satisfied legatee; but if the creditor or unsatisfied legatee will wave his claim on the Exr. & apply in Chan. against such satisfied legatee, that Court will compell him to refund his average proportion; but this is admissible only in case of the insolvency of the
2d. Vent. 358 Exr., & is a provision in favor of the debtor or legatee
2d Vez. 193 - & not of the Exr. -

In some cases the disposition of the property among those who are meant to be legatees, is left discretionary with the Executor, who may do as he judges proper; & yet if he manifestly goes contrary to the will of the testator & abuses his trust, Chan. will interpose & prevent him

Of Estates testated. Legacies.

A legacy is given in this manner - to the Children of J.S.: after considerable dispute, it is settd., that such Children only of J.S. as were in esse at the time of making the will, will take, unless it appears from the language made use of by the testator, that he ment to include afterborn Children - & this would be deemed to be his meaning were he to use the term issue, or other technical expressi-on usually importing all the Children - But tho' the will be such as to include Children in esse at the time of making the will only, yet a republication would include all children inter-mediately born - But if the foregoing rules of constru-tions can not be adopted without manifestly viola-ting the intention of the testator, they are to be abandoned - As if the legacy be to the Children of J. S. when he had none, those who are born after will all be entitled: & if it be to the Children of A. & B., & A. only have Children, the after-born Children of both will take, & that too per capita & not per stirpes - When a legacy is left to a the Child of A. & there was no child of A. in esse at the time of making the will, nor any after born, but there be a grand Child in esse, such grand Child shall take under the description of a Child - It has been a question who should

take, when the legacy was left to the heir of A. & it chance that such heir of A. die in the life time of the testator, by which another person not ~~not~~ the representative of such deceased heir becomes heir of A.; but the decisions have finally settled that the representative of such deceased heir shall have the legacy & not the new heir. And if a devise be to the relations of the devisor without further description, it is decided that those only would take by it, who would in case of intestacy take by force of the Stat. of distributions, but in such case of devise the relations would all take per capita & not per stirpes -

3^d Bro. Ch. 64 2^d Vez. 527.

In case of a Will disposing of all the personalty, it is operative upon all the property of that description of which the testator dies possessed, whether in possession at the time of making the will or not - A partial exception obtains in a case like this, where one gives as a legacy, a certain farm, with all the goods, chattels, furniture, impliments of husbandry & particularizing the articles, & at the testator's death a quantity of money be upon it, not enummerated; it seems it would not pass -

Ademption of a legacy, is when the testator in his life time disposes of the same thing which in his will he has bequeathed; in some cases of this kind however such legatee would have a claim upon the Ex^{rs} for an equivalent for such article, the will & it should seem that this claim exists unless it appears any

from the transaction, or some declaration of the testator, that such article was disposed of, on purpose to deprive the legatee of it. But if a legacy be lost by accident, as if it be a horse (for to authorize a claim for an equivalent it must be a specific legacy) & it die living the testator, the legacy is adeemed & the Exr. of course not liable for an equivalent. If after giving a legacy by will the testator in his lifetime give the same thing, or sum, to the legatee it works an ademption of such legacy, & if the testator gives in his lifetime but part of what he had by will before bequeathed it is an ademption pro tanto. & the rule to determine what shall be a performance by the testator in his life time, of his will with regard to the legacy, is the same as that which obtains in deter-mining what shall be accounted an advancement in the life time of a Parent, among Children —

It often happens that legacies are given upon condi-tion, respecting which it is a general rule that where the condition is contrary to morality, law or policy, it is void, otherwise it governs the legacy. Conditions in restraint of marriage, as not to marry at all, or not to marry a person of a particular profession are void. But when the whim of the testator is not against sound principles of law or policy it will generally be indulged & the legatee bound by it. As to the common case of bequeathing upon condi-tion of not marrying without the consent of a parti-cular person, it has been determined that if the legacy is not limited over, provided the condition be

broken, it is merely a condition in terrorem & void, but if limited over it is a good condition & will govern the legacy.* But yet if such legacy be ch[arged] upon the realty, & such condition be not complied with, it will sink into the residuum & be forfeited, tho' not limited over — When an Exr. has legacies in his hands due to infants at their ages of 21, he cannot safely pay them over either to the Infant, or parent or guardian, unless by direction of Chan; yet the parent or guardian giving bonds, the legacy may be paid over safely without the order of the Court — & by giving security under the direction of Chan. the guardian may compel paymt. of the legacy —

* 2ed vide 7th Bac. Ab. 494. quaere tit. 3. Leg. Ju. 89. contra, where the condition was not to marry be- fore 21 with- out consent. the condition held good tho' ch. on personalty only & not limited over.

2 P. Wil. 285

A legacy to a feme covert must be paid to the husband

In case of a vested legacy to be paid to the legatee at 21 years of age, or any other specified period, if the legatee die before the day of payment arrives, his Exr. cannot call upon the Exr. of the testator until such time as the legatee had he survived, would have been entitled to recieve the legacy — But if the legacy be given over upon the contingency of the first legatee's dying, it is otherwise: as if it be to A. at 21, & if he die before that age, to B.; B. would be entitled immediately upon the death of A. — It has been adjudged that a legacy thus given: to A. & if he die, then to B., that A. is entitled when of age or married which ever first happens; & if A. die after either of these events take place, his representatives will retain the legacy, for B. would be entitled only upon A.'s dying before he came into possession of the legacy.

 Of Estates testate — Legacies

If a legacy be given to A's Children he at that time having none, but afterward a Child be born, & the Exr. assent to it, that child will take the legacy, but with this condition that if there be after born Children, such first taker must admit them to an equal share, & hold with them. A legacy by a husb. ~~upo~~ to his wife upon condition of not marrying again is an exception to the foregoing rule. All testamentary matters were originally of Ecclesiastical jurisdiction; the Courts of Common Law had no cognizance of them, & the practice still obtains so that legacies are not suable for in those Courts except in a few instances — But Chancery has a concurrent jurisdiction with the Ecclesiastical Courts, of testamentary matters, & in fact now transact almost the whole of the business regarding legacies & whenever the legacy is to issue out of land Chancery has the exclusive jurisdiction — If an Exr. promise to pay a legacy, in writing according to the requisites of the Stat. of frauds he may be sued upon ~~that~~ promise in a Court of Law — Vide also Vo. 6. p. 92

Co. 4. 2. 7.

Stat. of Distributions —

The Stat. of distributions ~~which~~ passed 22d. of Car. 2d. — It is a matter of doubt whether this Stat. restored the old Saxon Com. Law practice or introduced an entirely new regulation — It had however been along time the practice, at any rate, for the Ordinary: & then the Admr. (after the Stat. passed compelling him to appoint one,) to convert the one third part of the

intestates property to his own use, after having dispo-
-sed of their rationabiles partes to the widow & children.
But the Stat. of Car. provides ~~that~~ the widow in case
of intestacy, shall have one third (& if there be no
children or representatives of children one half) of the
personalty (after debts pd) forever; & ~~that~~ the residue shall go to
the next of kin & their legal representatives, share, &
share alike — Among lineals representation ex-
-tends ad infinitum, but among collaterals by con-
-struction, it extends only to brothers & sisters children.
The modes of computing relationship ~~is by~~ under
this Stat. is by the rules of the civil, & not of the can-
-non law — When persons take as next of kin, if it
be by representation, or in loco parentis, they take
1. P. Wil. per Stirpes, but when in their own right they take
25-51 per capita — The difference of sexes makes no dif-
2. Do. 344 — ference in right, neither is the whole blood prefered
3. Do. by this Stat. ~~to the half~~ blood — propinquity only gov-
49 — erning — There is however one exception to this
1. Atk. 455 458 rule of the next of kin's sharing equally, which is
1. Ves. 156 in the case of the grandfather & brothers claiming
333 equally, they being in the 2^d. degree; for it has
2. Do. 213 been decided that the Grandfather shall be post-
Stra. 710 — poned to the brothers — And by Stat. of Jas. 2 a
Sal. 38 mother is degraded (whether a widow or married to a 2^d husb.)
2. Vent. from the first to the 2^d. grade, & put on equal foot-
317 — ing with brothers, & so instead of having the whole
estate as is the case with the father, is allowed
only an equal share with one of the brothers or sisters

 Of Estates testate & Intestate -

When ~~one~~ a Child has been advanced in the lifetime of the father, he cannot come in for his Share under the Stat. of distributions un-less he brings the prop.y advanced into hotchpot. As to what shall be deemed an advancement, it has been settled that money laid out upon a Child's education, or his travels, or common expences shall not be considered as an advancement but it must be some kind of setout, a some-thing which is immediately productive of profit where-by to get a livelyhood, as a marriage portion or the like - This bounty too, must come from the father in order to require it to be brought into hotch-pot, & not from any other relative, not even from the mother - for the Stat. takes notice of no advancement but from the father, & the same is the case with all our Stats. of

2.d P.Wil. 356 distribution, as well as the English - but whether ~~the words~~ letter of the Stat. would be strictly adhered to in Con.t is perhaps a doubt -

Where there is a Will, but the Ex.r refuses to act, administration is committed as in other cases, but with the Will annexed which is to be the Adm.rs guide, & his duty thereby becomes the same as that of an Ex.r - When there is no Will, by the Stat. of Ed. 3.d & Hen. 8.th, administra-tion is to be committed to the widow or next of kin, or to both, at the election of the Ordinary -

Of Estates testate & intestate

& he may not only appoint joint, but several Admrs for distinct parts of the estate; such seve-
Sal. 96 - ral Admrs however, are jointly liable to Creditors
But where there are a number in equal degree of propinquity the Ordinary may appoint such of them as he pleases - It seems however that of two in equal degree the one in the ascend-ing & the other in the descending line, the latter is to be preferred, as a son of the deceased is preferred to the father, & probably lineals are to be preferred to collaterals; with this exception, the rule is that the next of kin according to the computation of the Civil Law, is entitled to the Administration — If however females be married those of equal degree are to be preferred - the half blood stands upon the same footing with the whole
When the kindred refuse, the Ordinary may commit Administration to a Creditor; & if no Creditor will accept, then to some discreet person at his election - Yet in case of an Exrs refusing to act, the residuary legatee is to be preferred to the nearest relation - And in case of intestacy, when the next of kin is
Holt 251. an Infant, administration is to be committed to
2 Blac. some discrete person at the election of the ordina-
Com. 504 &c - ry, durante minori aetate - If the Admr. die before he has accomplished the business, neither his Exr. nor Admr. has any thing to do with it, but an Admr. de bonis non must be appointed - & if an Exr. die intestate his Admr. has no power over the unadministered property; but other-wise it is if the Exr. make an Exr., such Exr. being as much the Exr. of the first testator, as of the last —

 Of Estates testate & intestate —

The first duty of an Admr. when he enters upon the duties of his trust is to give bonds to the Ordinary with surety for the execution of the same, that is to say to make & exhibit, a true & perfect inventory of all the property of the deceased whether at his death or after, ~~by a lien~~ Within a limited time, to exhibit to the Ordinary an account of his administration; & to pay over the residue of the estate after satisfying legal demands, to ~~the~~ such persons as the Court shall appoint, which are the next of kin according to the Stat. of distributions — But for the deficiency or misconduct of an Admr. in other

1st Sal. 316 respects the bondsman is not liable, tho' a mistaken idea has prevailed to the contrary. For after having given in a true Inventory if the Admr. is guilty of a devastavit whereby the Creditors are kept out of their just dues, the remedy is against the Admr. only, & to his plea of plene administravit the Credr. may reply a devastavit, & if he substantiates his replication an Execution will issue against ~~the~~ Admr. de bonis propriis, & not as in other cases against the property of the deceased in the hands of the Admr., Neither if the Admr. becomes a bankrupt are the sureties liable — But should the Admr.

Sal. 316 - exhibit a false Inventory, & after administering all the goods contained in it, plead to the suit of a Credr. plene administravit, tho' such plea would be conclusive in that suit, the Credr. would have his remedy against the bonds-

& in short, whenever the ~~Administrator~~ is liable to the extent, personally, the bondsmen is not —

Query

When a bond of this nature is sued by a Creditor, he recovers only his particular debt, & the bond continues good for another Credr. to sue upon — But in Conect. when the Condition of the bond is the same but extends equally to Credrs., when one Credr. sues, if it be for want of an Inventory of the whole property, he recovers to the amount of the whole property proved to be left out of the Inventory, but here our average law steps in & allows such Creditor only his equal share with the other Creditors; yet still the bond continues good so that if it afterwards appears that more propy was left out, than judgt. had been obtained for, an other Creditor may ~~bring~~ sue the bond — Altho' the suit on the bond is brought in the name of the Ordinary (or the judge of Probate here) yet he is not bound to interfere nor to furnish a Copy of the bond to the Creditor untill he is indemnified ~~&~~ against the Costs of the suit — In Eng. if the Admr. tender the debt demanded the Credr. is obliged to stay proceedings — In case when the Admr. neglects to perform the other branches of his duty, as to account at the day fixed, the damages are only smart money — if he neglects to make an Inventory untill the bond is sued, but pending the suit the ~~Admr.~~ makes one, the damages will only be smart money. The powers of an Admr. cannot be rescinded by the

Ordinary at pleasure, because it is a matter of right; but for reasonable cause they may— as if administration be obtained by imposition there being nearer relations, or if there be a will found afterwards, or if the Admr. becomes incapable through lunacy, sottishness or the like & when this takes place another is appointed de bonis non; but the acts of the first Admr. while in office are valid, tho' some old authorities seem to countenance a contrary opinion— If the Admr. had any assets in his hands at the time of the revocation of his powers, he must pay them over to his successor; & if there be suits commenced, the revocation puts an end to them; but if they have been prosecuted to judgt. & Exn. issued the new Admr. may have a Scirefacias upon the judgt. & is not put to a new suit—

After bond given the property of the intestate vests in the Admr. (In case of a will the propy of the decd. vests in the Exr. instanter) so that he can exercise any act of ownership over it tho' a mere trustee; & generally speaking all the duties are incumbent upon the Admr. that was upon the intestate. But there are some actions to which the Admr. is not entitled which the intestate might have had, these are such as are termed strictly personal— In the early periods of the Eng. Law, the Admr. could have no action for a trespass committed either upon the person or propy of the intestate in his lifetime but by the Stat. de bonis asportatis testatoris trespass

Of Estates testate & intestate –

in the reign of Ed.d 3.d, a right of action was given to Exrs & Admrs (for their rights as to all these things are the same) for the wrongs in the Stat. specified, & by the equity of the Stat. the right is extended to all trespasses upon the property of the deceased, whereby the assets are diminished, but not to injuries to the person of the deceased – & such is still the law –

Off. of Exr. 98 – Latch. 168 – Cro. El. 377 –

It seems to be a sort of general rule in the Books that Admrs are liable for the Contracts but not for the torts of the intestate – But this rule is defective in both branches – For in the first place; the Admr. (or Exr.) is liable, tho' not in form, yet in fact, for all such torts of the dec.d as tended, or in common presumption would tend, to increase or benefit the assets in the Admrs hands; but for personal injuries & such kinds of trespasses as were merely mischievous, & tended nothing to the increase of the dec.ds propty, the Admr. is not liable – When the Admr. is liable for the dec.ds torts, he is not so quo ad actionem, for the personal quality of the injury dies with the person, & in this point of view the above rule is correct; but under another form of action the Admr. is liable for injuries that benefit the assets, the action, instead of trespass or trover which ~~only~~ could have been maintained against the dec.d, must be an action of Ass.t founded as on a contract, stating however in what manner the liability accrued –

Cow. 371.

The Admr. is liable for all those contracts of the intestate, for which there was an evident consideration to the intestate; but for those which were merely fiduciary the admr. is not liable, tho' the decd. was, for the Admrs. business is not with the trusts of the intestate, but with his property - so that in such cases where the intestate was liable for a breach of trust only, & no reward from the employer was due to him, the Admr. is not liable - as if a Sheriff suffer a negligent escape, or an Officer does not levy a warrant &c. for these neglects the Admr. is not liable; tho' had the Offr. in the Case put, collected the money upon such

Rol. 921 Saund. 218 warrant, his Admr. must have been liable for it, to the Credr. for that would have benefitted the estate.

For any injury done in the lifetime of the intestate or debt due him, the Admr. must sue as Admr. but for an injury done, or debt incurred subsequently to the intestate's death, the Admr. may sue either as Admr., or in his own name as he chooses -

When a Credr. is made Admr. he may retain for his own debt before paying others of equal degree, but cannot retain against a Credr. of Supr. degree -

There are some sorts of personalty that go with the realty & not to the Admr. - as deer in a park, Rabbits in a Warren, fish in a fishpond &c. - lies to lands extended for debt. That part of the propy. that is carried out by the process for security of the Debt

goes to the Admr.; but the remainder to the heir –
Tenancy per auter vie, by Stat. of Car. 2d. go to the Admr. –
but before that Stat. neither heir nor Admr. had any
claim to it. & it was open to the first occupant –
In this State that Stat. has no force, & what would
be the decision is uncertain —

Emblements, which are annual artificial profits,
& not fruits, grass &c; go to the Admr. – Respecting things
fixed to the freehold, the rule formerly was very rigid in
favor of the heir, but now it is much less so, & it seems
that if those things can be removed without essen-
-tial injury to the freehold the Admr. may take
them; & as between lord & tenant the rule
3 Atk. 23 – is more favorable to the latter than it is with
others — That species of property which is denomi-
-nated heir looms, go to the heir, as title deeds &c: but
whether the Chest in which deeds are kept go with
Rob. 915 them is a doubt — —

Inventories are made by appraisers, & as the case
may be, the Admr. is not liable to the extent of it,
for if he inventory all the debts he is not bound to make
up the losses sustained by the bad debts: but he is
not obliged to inventory the debts untill collec-
-ted, when he must add their amount, & be answer-
-able therefor — So too if he inventory an article
which is lost by inevitable accident afterwards,
he is not liable to make good the loss – he is
liable only for the actual property by him recd. & disposed
of according to law, or remaining for distribution —

Of Estates testate & Intestate

At Com. Law when ever a litegant died whe-
-ther Pltff or Deft. the suit died also, but by Statt.
in the reign of Charles 2d., a remedy, tho' a defective
one is applied – In this Country similar Stats have
been made – Now if the Pltff die pending ~~the~~
a suit, his representative may keep the suit alive
by ~~having~~ the proper suggestion entered on the record
& his name inserted ~~on~~ the ~~record~~ room of the deceased,
provided it be such kind of action as an Exr. or Admr. could
maintain – & this by our Stat. may be done at any
~~time~~ stage of the proceedings in which the Pltff happens to die.
But by the Stat of Charles & those which are copied from
it, it is necessary, in order to the Representatives enter-
-ing, that there must have been some interlocuto-
-ry judgt., imparlance, contin. or the like, during the life
time of the Pltff —— When the Deft. dies, the Pltff
in order to keep the suit alive must cite in
the Defts. Exr. or Admr., by a Scire facias which will
attach to it all the antecedent costs – But the Pltff's Exr
is not bound to carry on the suit of his testator, & in
case of a vexatious suit it seems the Deft. must sit
down contented with his loss, for no Exr. for costs can
be awarded in such case vs. the Exr., this seems a cas-
omitted – In Eng. when an Exr. or Admr. sues he
pays no cost however unjust his suit, except where
the cause of action arose after the death of the testa-
or intestate, in which case ~~he~~ he must pay cost whe
he sue in his own name, or as Exr. or Admr. if he failing

Of Estates testate & intestate—

In Connecticut Exrs & Admrs in all cases are subjected to costs where other creditors are—

Interest in ~~a~~ Mortgages is a personal interest & tho' it nominally goes to the heir, yet he is amenable to the Admr for the money due for the redemption ~~of the money due~~ of the Mortgage, & if the heir forecloses the right of redemption he can not retain the land without paying up the mortgage money—

It seems still a doubt whether an Exr has any interest in an apprentice— according to principle it should seem that all covenants were dissolved by the death of the Master, as the putting a Child an apprentice to a Master is a personal trust, & the apprentice is not, except by the Custom of London assignable— the covenants to instruct must therefore be discharged as to the Admr who may be of another

1 Sal 66 trade— But whether the Masters covenants to victual

Lev. 177 & other are dissolved seems more doubtful—

The next duty incumbent on the Exr or Admr after making the Inventory, is the paymt of the debts & in this he must observe the order of rank— 1st he is to pay the necessary funeral charges— 2dly Debts due the King (or State) touching his revenue; in this however is not included amercements— 3dly Such dues as are by Statt preferred to others, as the forfeitures for not burying in woollen &c— 4thly Specialty debts & 5th lastly simple contract debts— If an Exr or Admr be improvident, paying unfounded demands, he will be answerable

for his negligence, & be obliged to make up the loss to the Credrs if they are like to suffer thereby But when the Admr. or Exr. is at a loss about the justice of the demands exhibited, his safest way would be to file a bill calling all the Credrs into Chan. & have the justice of their claims there ex-amined & so pay under direction of the Court only & the expence of such proceeding would be deemed necessary, & would be allowed him out of the estate

An Admr. or Exr. is not bound to take all legal advantages, as pleading the Stat. of limitations, for if the debt be a just one it is not to be presumed that the testator, or intestate would—

When any one takes upon him to dispose the goods of the deceased without any legal autho-rity, he is called an Exr. in his own wrong, & may be sued by any Credr. & is liable to the extent of the assets which have come to his hands, but when they are exhausted he may plead plene administ-ravit— But he has none of the advantages of a rightful Exr., for he can not retain for his own Debt against Credrs in equal degree — The form of the suit in such case is not against such per-son as Exr. in his own wrong, but against him as rightful Exr., altho' it may be, no will was made, & consequently no Exr. appointed—

When a rightful Exr. or Admr. would bring a suit against such an intermedler, the ~~suit~~ action is trespass, to which he cannot plead plene administ

but may be allowed to prove paymt. of debts due from the estate in mitigation of damages - But when there is actually a rightful Exr. or Admr. in esse at the time of the intermedling, it is said such ~~person~~ intermedler can not be an Exr. in his own wrong but is a mere trespassor & ~~that~~ can only be sued as such, & that too by the rightful representative - except in a case of this kind, viz. when the deceased while in life makes a fraudulent conveyance of any propy to cheat Credrs; this as it would be good against the vendor while living, will also be good against his Exr. ~~when dead~~ or Admr., but not being good against Credrs before the vendor's death it does not become so by the happening of that event - & such Credrs may sue the fraudulent vendee as Exr. in his own wrong So likewise it is with a donatio causa mortis which is good against the Admr. or Exr. but not against Credrs - Formerly the law was so that when any article of personal propy was bequeathed to any one he took the entire propy, & it could not be limited over - but it is now otherwise holden - Of Chattels real it is allowable to limit them over from one to another ad libitum, provided all those to whom they are limited are in esse at the time of the limitation - Or the power may extend so far as to limit it over to a person when he shall be 21 which person is not born at the time of the grant - for the grant may be to A. B. C. &c now in esse, & to D. provided he be born within 21 years of the death of the last living donee - but perpetuities are not allowed

Of Estates testate & intestate

As to personal Chattels, the use of them may be given to one for life, & then the property to another, but the right of propy vests absolutely in the second — No entailments of Personal propy is allowable in Eng. for that would effect a perpetuity; but the estate in such case would vest absolutely in the first donee in tail: but in this State perhaps under our law it might be suffered for that in the case of real property vests in the 2d donee in tail, the absolute fee —

Bl. C. 398

In the early periods of Eng. Law Stats called Stats of Mortmain were enacted for the prevention of the accumulation of property in the hands of the Ecclesiastics, by means of devises (the power of devising uses having obtained) which had grown to be a great political evil — After the reformation the danger being in a great measure removed it was ordained by the Stat 43. Eliz. that gifts only to superstitious uses were within the Stat; & not donations for charitable uses — But the Stat. of Geo. 2 — put a stop even to these, & nullifies not only all gifts by will, but all grants by deed, unless made & completed at least one year before the death of the grantor. The two universities, Eton College & one other, were exempt from these restrictions — Men of non sane memory, & Idiots &c. are incapable of devising; so also those under the temporary insanity of drunkenness — The devisees of those

who are deaf & dumb are void unless it appears that they were made understandingly — Blind & unlettered persons wills are good, ~~unless it~~ provided they are truly read to them, & by them approved — A Will made under the impulse of fear may be ~~void~~ vacated — But it seems not to be accurately defined what degree of fear is sufficient for that purpose — ~~duy~~ Duress per minas certainly is, & indeed of a much lower degree — Wills & Devises made under the influence of fraud & imposition (unless it be a sort of pious fraud to prevent an improvident & foolish disposition of the propy) will be vacated ~~contract~~ entirely; & the examination of such questions is properly the Province of a Court & Jury upon an issue of devisavit vel non, but Chancery will sometimes interfere in the business. Such persons as have forfeited their property by the commission of Crimes cannot devise having nothing to will away — The leading Maxim in Wills & Devises is, that the intention of the testator is to govern when consistent with the rules of law — In construction of this Maxim, the spirit & not the form is to prevail; for if confined to the words it amounts to no more than this, that if the testator makes use of the legal forms his intention is to be followed & not otherwise, which would make the maxim of no force — but if it can be clearly gathered from the language made use of that it was the intention of the testator ~~intention~~ to dispose of his

property in a manner which the law allows of, that intention is to be followed, tho' he does not make use of technical language; or if he makes use of language which according to legal definition contains apt words for the conveyance of an estate which the law does not allow; it is evident his design was not to convey such an estate, but one which the law admits of, the intention is to rule:— As if one should give his Library to A. & the heirs of his body, which would create an estate tail which the law does not allow of; yet if it appear from the whole drift of the language used in the will, that the testator meant to give an estate absolute to A. it would be so construed; but if on the other hand it appeared to be the design of the testator to create an estate tail in the library, such intentions would not be followed being against the rules of law— Parole proof is not admissible to explain what is ambiguous upon the face of the Will; but if the ambiguity do not appear on the face of the will, but arise from extraneous facts, which may accord with the words of the Will, parole testimony may be adduced to explain such latent ambiguity, & thereby to discover the meaning of the testator; as if a devise to the testator's Son John, & it chance that he have two of that name— Or to shew the testator's mistake

a name when no person is accurately described by the words of the will – as if the bequest be to J. S.'s eldest son Samuel, & he have no son of that name, parole testimony would be admitted to shew that he ment Jas who was ~~the~~ really the eldest son of J. S. — But when one person is sufficiently described such testimony is never admissible to shew that the testator ment some other

2 Atk. 372 person – And if no devisee be named, parole proof cannot be admitted to shew who the devisor designed should take – But when the devise is to one not in rerum natura parole proof will be allowed to shew who was ment –

To rebut an equity such proof is admissible: as when there is no residuary legatee, in which case at law, the Exr. takes the surplus, but if a legacy be given to the Exr. Equity deprives the Exr. of the surplus in favor of the relatives of the testator; this equity may however be rebutted by admitting parole proof to shew that it was the testator's intention, such legacy notwithstanding, that the Exr. should have the residue – But on the other hand, if no legacy was given to the Exr. parole proof is never allowed to shew that it was not the testator's intention that the Exr. should take the residue according to the common course of Law

3 Bro. Ch. 172 In the Case of Fonnereau & Poyntz, parole proof was introduced not in terms to explain a patent ambiguity, but to shew the state of the testator's propy. from whence to infer the meaning of the ~~will~~ testator in a doubtful point in the will –

Of Wills & Executors

To make a good Will of personal property, it is enough that the Will be signed by the testator or by his direction & neither seal nor Witness is essentially necessary, & it has been decided that it shall be deemed a sufficient signing if the testator's name appear in his own hand writing on any part of the Will, provided it be used in such a manner as to be evidential of the testators intention that the instrument should be his will— And in some cases even signing is dispensed with provided that it be in proof that the testator made & published the writing as his Will— And even tho' it be not in his own hand writing, but is proved to be made by his direction, & approved of by him as his will—

An Infant may be an Ex.r but cannot act untill 17 years old— Persons having no discretion & those besotted with drunkenness may be displaced if appointed— A legacy given to a feme covert & in these words terms. to her sole & seperate use, will vest in her & not pass to her husband— & the allowance of the inclinations of the testator to be followed in this, seems an exception to that part of the Maxim that his intentions to stand, must be according to the rules of law, for there is no better established a principle than that a feme covert cannot have personal property— A donatio causa mortis is a gift of any thing in contemplation of death, on condition of being

3 P. Wil. to the donor in case of his recovery - Such bequests are
406 not good against Credrs - in order to make such gifts va-
-lid in any case there must be an actual tradition
from the donor of the article given, or of the means
of acquiring such article, as a delivery of the key which
2 Ves. 431 - opens the apartment where it is kept - It has been a
question whether the delivery of a Bond is a good bequest -
of this kind to carry the money secured by it - the difficul-
-ty about it, arising from the mode of bringing the suit which
must be in the Exrs name, a bond not being a negotiable
instrument; for it is said the Exr might disallow the
suit, but the same difficulty would attend the col-
3 P. Wil. lection of any assigned bond; but in both cases Chan.
441 - would assist the holder of the Bond against the Exr -

vide. No. 6. page 95

Of Wills & Executors

Nuncupative Wills were allowed at Common Law, & as personal property only was the subject of devises, they applied only to that; & it does not appear to have been necessary that they should at any time subsequent to the death of the testator, be put in writing, untill the Statt. of frauds

2d Blac Com. 501 — imposed that & numerous other restraints upon them which have narrowed them to almost nothing

It is a well established rule, that a Will of both real & personal property, if sufficient to pass the personalty, but destitute of the formalities necessary for the passing of real property, is void as it respects the realty but good to pass the personalty — This it is manifest will in many cases infringe upon the rule that the intention of the testator is to govern, & not be defeated; for had he been about to dispose of his personal estate alone he, three times out of four, would have made a different disposition of it — Before probate of a Will an Admr. has no power to act, but an Exr. may do every thing before probate which he may after except that of commencing suits, which he cannot do untill after proving the will — After having done any one act as Exr. he can not renounce

Sal. 301 — the trust, but is liable as Exr. to others whether he proves the will or not — Altho' the person ap-

-pointed Exr. is not obliged to accept, yet he is compel-
-lable by the Ordinary either to accept or refuse —
When several Executors are appointed any one of
them may prove the Will & act as Executor tho the
others refuse; & after refusal they may at any time
after come in & act with the accepting Executor pro-
-vided it be in the lifetime of such Exr. as proved the Will
In this State the law is otherwise, for here having
once refused the Exr. can never after interfere —
It is necessary in any action brought by an Exr.
to name as Plffs all who were by the Will appointed
& are living altho' some of them refuse to act. (in
Connecticut it is otherwise) but in actions brought
against them, the acting Exrs only need be named,
& if a refusing Exr. be named Deft. if he has never
intermeddled he may plead that he has never adminis-
Rol. 918 -tred & it will exonerate him from the suit —
The Exr. of an Exr. is to all intents the Exr. of the first testator
but he may refuse that part of the trust if he chooses
tho' he cannot accept as Executor to the first testator
& refuse as to the last. But if there be more than one
Exr. the power survives to the survivor, & the Exr. to the
deceased Exr. has nothing to do with the business — and
if the surviving Exr. dies intestate, still the Exr. of
the first deceased Exr. has no authority, but adminis-
-tration must be committed de bonis non. But
the Administrator of an Exr. or the Exr. of an Adminis-
-trator, has nothing to do with the goods of the first deceased

Of Wills & Executors

When there are several Exrs & one of them is guilty of a devastavit, he alone is liable de bonis propriis, it being a personal tort, & in such case judgt. is rendered severally where both are sued. But if it appear upon the trial that the property wasted had ever been in the hands of the honest Exr & by him delivered over for any purpose whatever into the hands of him who committed the devastavit, both will be held liable. It was formerly holden that this liability was incident to the honest Exr only in the Case of Creditors
2 Bro. Ch. 114 losing their debts, & not in the Case of legatees suffering loss, but this distinction is now over ruled. There are two modes of proving wills 1st by the oath of the Exr that he believes the will exhibited to be a true one - if the Will be of personal propy only, or of real & personal propy together, the proof must be in the Ecclesiastical Court, but if it be a devise of land only, it must be at all times proved in Chan. - The 2d. Mode of proving wills is "by due form of law": as it is termed - & this must be always done, if there be any dispute concerning the authenticity of the Will - This is done by citing in the heir or other interested person to hear & object if they see cause; & the will being so proved cannot be afterwards questioned, but if proved only in the first mentioned mode ~~then~~ it may be any

time within ten years: & whether there be a dispute or not the Ex.r to make all secure may always take the 2d mode of proof if he choose — If the Ordinary refuse to grant letters of administration he may be compelled to, by a writ of Mandamus, or shew sufficient cause; & his certificate of legal inability in the claimant is conclusive — but yet if it be a false one, he is liable in a suit for damages, to the injured person — The Ordinary has more power over an Adm.r than over an Ex.r — he can revoke the letters of adm.n if the adm.r ~~prove unfaithful~~ be found to be in failing circumstances, but has no such power over an Ex.r. He cannot refuse the probate of a Will to the Ex.r unless there be a total
ol. mental incapacity; neither can he compel him to
99 give security tho' Chancery may —

When one devises his realty to pay debts ~~it has been~~ it has been adjudged that the personal fund must first be applied unless there be an express saving of it — & it is very questionable whether this mode is agreeable
Wils. to that principle in the construction of Wills. that the
24 intention of the testator is to govern — A devise that all ones debts shall be paid will take those out of the Stat. of limitations, which would otherwise have been barred thereby — this seems to strengthen the idea that a waiver of the Stat. is the true ground of the revival of such debts as are barred by it — & if one publish in the Newspapers that if his creditors will

exhibit their claims, he will discharge them; it is a waiver of the Stat. with regard to such as are outlawed unless he make an exception of them –
2d In the State of New York (as well as in Eng.) the personal estate goes into the hands of the Exr. & the real estate into the hands of the heir – But both heir & devisee are liable, or rather the propy in their hands derived from the deceased, for all debts not only specialty, but simple contract; & if they alien such property, they are as in Eng. personally liable – The real & personal property are concurrent funds for the discharge of debts, & the Credr is at his election either to call on the Exr. or the heir – but if they come upon the Exr. only, he cannot take measures for subjecting the realty untill the personalty is exhausted, when by applying to the Court of Probate & exhibiting a statement of the whole business, he can obtain an order of Court to sell so much of the realty as is requisite to make up the deficiency of the personalty; & when the Estate is insolvent, the whole real Estate is to be sold & the avails brought into Court where it is considered as equitable assets & all the Creditors are paid pari passu ~~as in Eng. & the distribution of the property~~. The same persons are entitled to administer, as in England

New York law –

Of Estates testate & intestate –

& the distribution of the personalty is according to the Stat:s of Car. & Ja:s – Children who have been ad-vanced in their father's lifetime do not as in Eng., bring their advancement into hotch pot, but upon the adjustment of the whole, if such advance-ment is found to be less than their share, they are allowed enough to make up such deficiency – The rules respecting legacies are the same as in Eng. only that the Court of Probate is a substitute for the Eng. Court of Chancery. & the rules which go-vern the Chancery & spiritual Courts are those whi-ch govern the Court of Probate – the execution does not issue from the Court of Probate against the goods & chattels, but against the body only – It seems that the Ex:r in N. york is liable not only for those torts ~~which~~ of his testator which benefitted the assets, but for those also which only injured the property of the other party without benefitting the assets –
The Ex:r is here, as in Conn:t, bound to inventory the real as well as the personal Estate ——

Comment– Law– By the adjudications of our Courts it is settled, that the real Estate goes to the heir immediately, & if any inju-ries are offered to it, he is the person to bring the suit, but the title of the heir is a defeasable one, for if the assets in the hands of the Ex:r are insufficient for the pay:t of debts the real prop:y in the hands of the heir must be resorted to, as a subordinate fund however,

Of Estates testate & intestate

& to be resorted to only in case of the deficiency
Con.t Law. of the personal fund— In which event the Ex.r or
Adm.r must present a Statement to the Court of
the am.t of the debts, personal prop.ty, deficiency &
upon which the Judge of Probate will issue his
order for the sale of so much of the real Estate by
the Ex.r or Adm.r, as is requisite to make up such
deficiency—& their conveyance under such order,
good & legal, & divests the the heir of his title—but
it has been held that nothing short of an actual
sale under such order will affect the heir's title
for if after the order obtained the Ex.r pays the debt out
of his own pocket & keep the land himself, the heir's
right & title is not at all affected by such proceeding
he may call the Ex.r to an account for the rents &
profits— And even in the case of the insolvency of
the testator, the heir is but a trustee to the Ex.r & is
answerable for the rents & profits of the lands while
in his hands, such profits as well as the lands being in
such case considered as assets for the pay.t of debts—
There is an obvious inconvenience in this mode
system, & probably it would be better that the real
as well as the Personal prop.ty should come first into
the hands of the Ex.r— It is questionable whether
the heir can be sued at all in this State, as heir

Of Estates testate & intestate

for the personalty is first to be exhausted, & then all the realty is subjected to the control of, & used if necessary by, the Exr., so that there being no property of the deceased in his hands, why sustain a suit against him? unless indeed in case of the insolvency of the Exr., & then by anallogy to Eng. proceedings it should be by application in Chan- Indeed upon ground of principle it should seem that an action should not be maintained at law against the heir - but should it be deemed proper, how is the action to be brought, against one, or all the heirs? This at least may make a figure in a New York Court where an action is by Stat. given against the heir —

In the case of Mortgages it has been the practice for the heir only to bring Eject. vs the Mortgagor, & yet the interest is in the Exr. for the interest of a Mortgagee is a personal one, & goes to the Exr., & it would seem more convenient to give him the power of ejecting —

In this State an order respecting the rank of debts obtains ~~in this State~~ viz, administration charges, those of the last sickness, & dues to the State as obligations &c are to be first paid - The preference of one of these to another is not given by the Statute, but perhaps the order in which they are mentioned is the proper & true one —

Of Insolvent Estates

Com. Law. When an Ex.r or Adm.r finds, or supposes the Estate to be insolvent, he must (or suffer the consequences) represent it as such, to the judge of Probate — and this he should do before he pays any debts except those to which the Stat. gives the preference, for if he pays some & then make the representation, the shares of those who come in under the average will not be the less for what the Ex.r has over paid to any one before, so that if the Estate be, for instance, sufficient to pay no more than 10/ on the pound, & the Ex.r ~~will~~ before making his representation of insolvency, should pay a debt of 50£ in full, he would be allowed in the final adjustment no more than 25£ for such pay.t & must advance the other half out of his own pocket to make up to other Cred.rs the deficiency made by such overpay.t — possibly he might recover back such 25£ from such Cred.r upon the ground of being paid by mistake, but this is at best doubtful, & at any rate he must do it, if done, at his own expence & risque — Upon the representation of insolvency the Judge of Probate is enjoined by the Stat. to allow time not less than 6, nor more than 18 months for the exhibition of Claims, & appoint Com.rs to examine them, who are a Court with powers of determining upon the allowance or disallowance of such claims as are exhibited.

Of Insolvent Estates —

And if such Comm^rs^ reject a claim it is totally barred unless the Judge of Probate rejects the report of Comm^rs^ & directs a reconsideration of the business by the same or other Comm^rs^ which it is by some said may be done, but such a mode is not by the Stat. pointed out — & is not in gen^l^ practice — If a judge accept a report it seems to be a doubtful point whether the Cred^r^ whose claim is rejected can further contest it by appealing to the Sup^r^ Court as from all Judg^ts^ of Probate he may; for it has been decided that the determination of Comm^rs^ in such rejection is final, & it has likewise been decided that it is not tho' the prevailing opinion at present is that their determination is final — During the foregoing proceedings no suit is maintainable against the Ex^r^ for any debts except preferenced ones, which must be p^d^ in full — If the Ex^r^ is dissatisfied with the decision of ~~any~~ the Commissioners in the allowance of any claim, he will not be bound by such decision but may contest it at Law when called on for the paym^t^ of such debt & will be allowed a reasonable sum for the support of such contest — this does not impede the ~~sett~~ settlement of the Estate, for the Judge of Probate strikes the average upon the am^t^ reported due by the Commissioners & paym^t^ is to be made accordingly, & if the Ex^r^ is ultimately successfull in repelling the claim a new average is struck of such savings for the benefit of the other Creditors —

Of Insolvent Estates -

If by the Comrs. report it appear that the debts surmount the Inventory, it is apparent that the Estate is insolvent; but on the other hand, if such reported Debts does not exceede the Inventory it does not of Course follow that the Estate is not insolvent, for the articles inventoried may not fetch as much as they were estimated at, & the Exr. is liable only to the extent of what such articles fetch when disposed of according to Law - & in case of such doubt the Exr. is allowed to collect the debts & dispose of the propy. which when done decides the point of solvency or insolvency; if the estate turn out to be solvent, the Judge has only to order paymt. of Debts & legacies & a distribution of the residue - & the Exr. is then liable to the full amt. of all allowed claims whenever called on, in the same manner as if he had never represented the estate insolvent - for the insolvency & payt. of the average is the only plea for an Exr. when sued for debt - But if the estate be finally found to be insolvent, the Judge of Probate will then strike the average which entitles each one to so much in the pound as the estate will pay, for which the Exr. is then absolutely liable - & if any Credr. gets judgmt for his whole debt previous to a representation of insolvency, but have not levied his Execution, such execution must be stayed untill the average be struck & issue only for the average sum - An Exr. here, can never plead pleine administravit, for if the Estate be solvent

must pay all, & if insolvent he must pay the average & plead such average pay^t; this as it respects Creditors; but to the suit of a legatee plene administravit is the proper plea — The law of Con^t. respecting legacies, is in every respect the same, with the law of Eng., excepting that it is a doubt whether this same interest or not — Nor is there any opportunity in our law of replying a devastavit; for if the Estate is solvent the Cred^r is entitled to his whole debt from the Ex^r & cannot complain of his mismanagement, & if insolvent the Judge of Probate is to see whether there be a devastavit, & if the Ex^r impose upon him a false inventory he is liable upon the Probate bond (for in this State both Ex^rs & Adm^rs give bond) no pleadings or proceedings for the recovery of debts, may be such as to defeat our average law, but that of replying a devastavit if allowed would have that effect — Neither can a devastavit be the replication of a legatee when there is an average of debts struck, but the bond is his resort, & if the Ex^r has made a false inventory he will be holden liable to such aggrieved legatee through that medium — but if there be no average & of course the estate solvent, a legatee may reply a devastavit to a plea of plene administravit. When Comm^rs are appointed, if a Creditor does not exhibit his claim by the time limmited he shall says the Stat., be forever barred, unless he discover (or there be discovered) new estate — Upon this subject the decisions have been confused & contradictory, whether the cred^r in this predicament shall be entitled to reco-

-ver his whole demand, if such new discover-
-ed estate be sufficient to answer it, or whether
he is to be put upon the same footing with such
as has taken their average; & also whether those
who had previously got their averages could be
benefitted by new discovered estate — The just
mode it is conceived, (& it has one determination in
its favor) would be to apply to the Exr. & get the
new discovered estate added to the inventory, which
he is compellable to do by a suit on the bond, or to an-
-swer in damages to the amt. of such new discovered
estate — then the above Credr. who did not come in under the
first Commission, a share out of the new found prop-
(if sufficient) equal to the average share of the
other Creditors; & then all being upon equal
ground, distribute the residue among them, & if
more than sufficient to pay all, then to the next
of kin — It seems that when there is no new discovered
property, but the estate upon examination turns
out to be solvent, yet no creditor who has neglected
his claim within the limited time can ever recover
any part of such debt — It is a quere with the de-
whether there can be any such Character in this
State as an Exr. de son tort, because the operation of
proceedings against such a character would be hostile
to our average law — for our Stat. giving no direct-
respecting a recovery against him, the Credr.
who sued him & prevailed would get his whole debt
if such person had got sufficient assets into his hands to satisfy

his demand, & that too, tho' the Estate were insolvent. No Court however has by a decision sanctioned this opinion — The Exr. having the whole control of the real as well as personal estate, it seems doubtful whether the heir is bound by any of the Covenants of his ancestor — those covenants to be sure, which run with the land bind him if he has the lands in his hands, but the same is the case with a vendee of them, so that as heir, it is questionable whether he is bound —

Neither Probate nor Chan. Courts have any thing to do with enforcing the payt. of legacies in this State but it is the province of the Common Law Courts alone — In this State when an Exr. brings a suit & fails, he pays cost like other suitors — Our Stat. of distributions as it respects personal property is the same as the Stat. of Charles with these exceptions, viz. by our Stat. the brothers & sisters of the whole blood & their legal representatives, notwithstanding they are in the 2d. degree, are preferred to those in the first degree, towit. Parents, & to those of the half blood in equal degree; & the brothers & sisters of the half blood & their legal representatives tho' postponed to those in the first degree, & to the brothers & sisters of the whole blood, yet are preferred to all others of the 2d. degree as grandfathers &c — The probate of the will is not strictly according to either of the Eng. forms the common form there is totally rejected; & all the proof that is necessary is required by the Judge of Probate — the method is for the Exr. to bring in the will

& offer the necessary proof; i.e. the best the nature of the Case will admit of — the will then remains in Court & time is given that the widow, or whoever is interested may come in, & enter their caveat, for they are not cited in by the Exr. — a day is then assigned & the Exr. is cited in to hear the objections of the opposers of the Will, & the Judge of Probate makes his determination upon the whole — this is a universal rule of conduct, tho. not prescribed by Stat. — The practice of making nuncupative wills not having obtained in this State, it admits of a doubt whether such would be considered as a legal devise. But if such wills are admitted of here, they are free from the restrictions imposed by the Stat. of Car., & are therefore as at common law — The method of compelling one who is appointed Exr. to accept or refuse, is in this State, to impose the Stat. fine untill he comply — An Exr. in Connecticut whether he has a legacy given him or not, is not to take the residuum unless by will appointed as any legatee — Perhaps one reason for this is that Exrs. are here pd. per diem for their trouble which is not in Eng the Case — An Exr. is therefore here no more than a trustee in any respect — It seems not fully settled whether an Exr. may be a witness in an action brought by him as Exr.; & there seems no good reason why they should not here, where he can have no interest under the will; for tho' he is liable to co

still he is allowed out of the estate for it unless indeed he has conducted so badly in the business as to induce the C^t of Probate to refuse it—

In case of insolvency the Judge of Probate exempts from the average, in favor of the widow, such articles as would be exempt from Execution— Courts of Probate have also been in the habit of allowing, before making the average or distribution, to the widow, if poor, something over & above her legal share, for present support, as provisions in the house &c, at discretion: but this is liable to be revised & corrected by the Sup^r Court; & indeed the whole business is questionable— It is a rule that judg^t debts are not to be preferred, but a quere may arise whether this rule extends to the compelling those Cred^rs who have secured their debts by attaching the prop^ty of the deceased before his death, to relinquish their holds— Such Creditors as have levied their Ex^ns before the death of the insolvent can sell the prop^ty so taken after his death; but if the Ex^n be not levied before his death it cannot be afterwards, for it might destroy the average, & the law declares judg^t debts in such case to be on a par with others; but whether this provision holds to undo the hold obtained by attach^t, is perhaps not quite so clear— If one die in possession of an Execution, still the money may be collected & paid over to the Ex^r, tho' this seems to have been doubted of—

Of Insolvent Estates —

The Court of Probate makes distribution of the real as well as personal prop^y. notwithstanding which our Courts consider the realty as not going to the Executor but as descending to the heirs before distribution, as tenants in common — When there is no contest among the heirs about the right of succession, the proceedings of the Court of Probate in making the distribution among those who are acknowledged heirs, is final, & not to be revised by any other — But when there are two sorts of heirs who contend for the right to the succession, & the C^t. of Probate decides in favor of one of them & distributes accordingly, the aggrieved party may either take an appeal to the Sup^r. Court (18 Mo. being allowed for appeals from all decisions of the Court of Probate) or else pro-ceede in ejectment to try the title without noticing the proceedings in the C^t. of Probate — If an appeal be taken & the C^t. of Probate's decision be reversed, the Sup^r. C^t. issue an order for a distribu-tion to all the appellants, & for this purpose all the claimants should bring forward their appeal to- & the C^t. of Probate must accordingly cause a new dis-tribution, for all distributions must be by authority of the Court — Neither here nor in Eng. can an Ex^r. body be taken for the debt of the testator — It seems that constituting a debtor Ex^r. does neither in case of solvency nor insolvency extinguish the debt — As we have no Stat. upon the subject of revoking wills of either real or per-sonal prop^y, that subject remains as at Common Law —

Vide No 6. p. 93. 294 —

Miscellanious—

Property in animals feræ naturæ differs from that in others, & is commensurate only with possession, yet straying or being driven away doesn't in those animals which were reclaimed, divest the propy as long as they retain the animus revertendi— Injuries done to this kind of propy are remedied in the same manner as injuries against other propy are viz. by action of trespass— But for the abduction of those kinds of animals that are kept for whim only, & have no intrinsic value, as dogs, Parrots &c no criminal prosecution lies, it not being theft— But to steal deer from a Park, or any other creature which may tend to support life, is felony— Property acquired in these creatures is gained either propter industriam as by raising & feeding them; or it is propter impotentiam, as in young birds before they are able to fly, when hatched on one's ground or trees— &c deer be chased out of ones park the propy in him is not there by lost— But any such wild creature when at large is open to the first occupant, & it is not trespass to go on to another's land to take it, whatever it may be— A dispute has arisen respecting the propy in Bees, growing out of a clause in the forest laws, which gives all the honey found in the forest, to the owner of it, hence it is thought the propy of the Bees is in the owner of the forest as well as the honey. But the forest laws being of no force in this State, both honey & bees are the propy of the finder, & it is not trespass for him to go on to the land & cut the trees in order to get the bees: tho' in-deed he must make good the damages if he does any tho' trespass will not lie— There is a qualified propy in water, air & light— large streams, such as are in any way used for navigation, even of Canoes, are considered as public property, as a highway— but smaller streams while passing through the land of any one, are his propy & the owner of the land has not only a right to it when actually passing, but has a right to have it pass, & no one may divert the stream who owns the land further up the stream— Such water may be transferred without transferring the land, as by granting the use & modification of it, for carrying mills &c & that either on the land or below it on other land

[illegible] is a preference in it since but the honey belongs to the owner of the tree [illegible]

Misscellanious—

In large & public streams one may by public grant, obtain a right to a particular fishery to the exclusion of others— This propy is called in law an incorporeal hereditament, & is of course considered as real estate & descends accordingly— A right to a pure air, or to unobstructed light is a property of the same kind, for the protection & preservation of which the law gives a remedy by action on the case—

A chose in action always arises from a Contract either express or implied, & is a thing devisable; not so with a bare right to an action for damages; such a right of action vests no propy 'till judgt obtained, & so can never be disposed of in any way. But choses in action tho' not generally assignable, unless in particular instances permitted by law, but are protected in Chan. when disposed of; but a right to damages merely never is—

Personal propy may be held in joint tenancy or tenancy in common in the same manner as real estate is, with the exception of the propy of Merchants in trade & the stock of joint farmers upon a farm, both of which are exempt from the incidents of the jus accrescendi,— Joint tenancy either in real or personal propy is not known in Connect. In the State of New-york to constitute a joint tenancy it is requisite ~~that~~ the grant creating it, should expressly declare that the propy was to be held in joint tenancy otherwise it will be considered as a tenancy in common—

The title by occupancy takes place when goods are lost or abandoned by the owner, & found by another, in whom the title is good against all but the

Of Occupancy

original possessor, unless restrained by particular regu-lations; & ~~even~~ in case of abandonment, the title of the finder is good even against the origl. owner also—
In this State it is so regulated by Statute that [illegible] the profit accrues to the finder, it being his duty to enter information at the town Clerk's Office, with the goods & make public the finding: & if by the time in the Stat. limited no owner claims them, they are sold, & the avails after paying the finder for his trou-ble, is paid into the town treasury— It has been de-termined that money is not within that clause of the Stat. which gives the propy to the town, but that it belongs to the finder— sed quere— A title to emble-ments is said to be acquired by occupancy— this seems to be a species of property of doubtful ascription, for some times it is considered as personal & some times as real propy— When lands are sold the grain growing on them passes with the land as part of the realty, unless specifically reserved. Previous to the Stat. of wills ~~em~~blements were devisable, & for this pur-pose considered as personal propy— formerly they could not in Eng. be taken in Exn., tho' now by Stat. they are liable both to Exn. & distress— they are forfeited for felony when lands are not— they may be convey-ed without deed like other personal propy & yet it is not theft to sever & carry them away, in which they are like real propy which is not the subject of theft— yet if the taker finds them severed, or severs them at one time & carries them off at another it is theft— Neither will trover lie for severing & carrying them off, if it be one continued act, but trespass only—
N.B. as it respects property in Water— the occupant cannot be disturbed in the use of the water by any subsequent occupant either above or below him, yet it seems if one had built a mill & after another should erect a mill further up stream, he would have a right to dam up the water some part of the time, tho' not to divert it— neither indeed can the first occupant make any alteration in the stream to the disadvantage of subsequent occupants after they have got hold of the property—

Property by accession – is where one takes the property of another as his timber, clothe & bestows labor upon it, the original owner will have the right to the prop.y with the [illegible] of value occasioned by the labor of the intermedlar – But where the species is by such labor changed, the right of the first prop. is so far divested that he cannot take the prop.y, but must [illegible] his action for the unlawful taking – as in case of wheat turned flower & the like – So too in the case of Confusion as it is call. as where one mixes his grain with the grain of another, he who wilfully does the wrong shall lose his part – In time of [illegible] if the prop.y of an enemy falls into the hands of one authorized [illegible] captures it becomes absolutely his, but if it be taken by [illegible] & unauthorized plunder it might be recovered back or the value of it at the return of peace tho' not before – If an enemy [illegible] his goods voluntarily into the port of his adversary, they would become the prop.y of the 1st occupant – As to goods taken by an enemy & retaken, the law formerly was that the last captor acquired the absolute prop.y unless, ~~unless~~ the recaption was on the [illegible] day with the first taking, & the origin.l owner put in his claim before sun set, & this seems still to regulate land captures; but the recaption of prop.y at sea does not vest the prop.y in the recaptor unless the prize had been ~~carried~~ into an enemies port & there remained one night – There has been a great question as to the right of authors to ~~their~~ be the sole republishers of their works It seems that Chan. first interfered to secure this right to authors In the reign of Ann, a Stat. was made securing to authors the right of re publishing their own works for 14 years, & if alive at the end of that period, to have the right extended to another like period For the Common law right & whether impaired by the Stat. of Ann [illegible]
2d Burr. which case was finally decided against the author's right –
2303 – For title by prerogative vide 2. Bla. C. 408 – By forfeiture – those crimes which real prop.y are forfeited work a forfeiture from the commission of it but those for which goods & Chattels are forfeited only from the conviction Title by succession is applicable only to aggregate Corporations & those tho' sole as to the head or representative, are composed of many individuals as a monastery represented by an abbot – but this title is not [illegible] dent to those which are strictly sole, as the vicar of a parish, for whatever is given to him as vicar, goes to his Ex.rs & not to his successor – the reason given is that chattels personal cannot lie in abeyance, as they would A voluntary association unless authorized by law ~~cannot~~ have the rights incident to Corporations

Of Evidence

The first & leading rule respecting Evidence, is that it should be the best the nature of the Case will admit of. This rule however does not mean that no fact may be proved by a lower kind of evidence, when the nature of the thing admits of its being so circumstanced as to be capable of a higher; as ex. gra. that a verbal contract can not be proved because it might have been put in writing; but only that when it appears from the nature of the thing or from the whole proceedings that the party offering the evidence has it in his power to exhibit that which is of a higher nature, ~~then~~ that which he offers must be rejected; as if one offer a Copy in evidence when it does not appear but what he has the original at command — Testimony will be rejected for irrelevancy only, when it does not appear to be otherwise exceptionable —

Written evidence — The Grand division of Evidence is into written & unwritten — Written evidence is divided into matters of Record, & those which are of an inferior nature, — Matters of Record are Legislative & Judicial acts — those of an inferior nature are registers of births, marriages &c which in the view of the law, are only memoranda kept by authority — So private deeds tho' required to be recorded, yet are not technically speaking matters of record, but only things recorded — Those things which are matters of Record are generally proved by authenticated copies, as the original is never allowed to go out of their proper repository — A Copy of a Copy is with a few exceptions, inadmissible evidence — There are two kinds of legislative acts, public & private.

Of Written Evidence

Of public acts, or those which respect the whole community, the printed Stat. Book is the proper evidence; indeed it is not even necessary to offer that in evidence because its contents is supposed to be in the minds of the triors, they being bound to take notice of all public acts- As to private Stat.s i.e. such as respect private individuals or ~~par~~ particular set of men in their private capacity, & not as a constituent part of the public, the Stat. Book is not evidence unless compared with the orig. & certified- In Con. however this distinction is not kept up, for here the Stat. book is good evidence of private as well as public acts; & so indeed are the printed Stat.s of other States admitted here to both purposes provided they be publ. under authority of their respective laws by the authorized printer - their correctness may however be questioned by the adversary. In the neighboring States it seems that the Stat. books of other States are not good evidence of Private acts but the Eng. mode is resorted to-

It is observable that generally speaking, public Stat.s are not to be pleaded, but the Court will take notice of them ex officio if not even offered in evidence- yet if such Stat. goes to make void a written security for any debt or duty, it must be specially pleaded & cannot be taken advantage of in any other way, as the Stat. against usury; this rule does not extend to verbal contracts- Also in case where one Stat. subjects a person for doing what is prohibited in it; & another by way of proviso to the former excepts persons of a particular description from the penalties of it, such latter excepting Stat. must be pleaded; but if the proviso be contained in the same Stat. which prohibits it may be given in evidence it being but one Stat.-

In Con.t ~~the~~ practice is the same tho' no law imposes it-

Of Written Evidence

In Eng. private Stat. must always be ~~given~~ pleaded, in this State they may be pleaded or given in evidence at the option of the party, but one or the other must be done the Court not being supposed to be cognizant of them—

When a judgt. of Court is given in evidence the Copy must be authenticated by the seal of the Court (or if it be not a Court of Record, certified Copies from the proper Officer will do) or the person who compared the Copy with the original must appear personally & attest the truth of the Copy — & yet against this latter mode of proof the adverse party may make an averment & disprove the correctness of the Copy, by producing a Copy under seal variant from it— And when the issue is nul tiel record no verification short of the seal will do— No averment is allowed against a Copy under seal — In this State it is not necessary for the Copy to be under seal of the Court, & it rarely is so, but the Certificate of the Clerk is full evidence, & none of a lower nature, as the oath of a person who compared the Copy with the orig.l, is here allowed, unless in the absence or sickness of the Clerk & judges— But Copies going into another State must be under seal if the Court have one—

In Eng. the practice is that those papers only go to the jury which are authenticated by seal or the certificate of the proper Officer — but those which are supported by viva voce testimony are not committed to their hands when they retire — In this Country that silly distinction is universally exploded & all the exhibits are committed to the jury—

When a judgt. of Court is in consequence of a verdict, that verdict & not merely the judgt. is produced in Evidence upon a subsequent trial — This sort of evidence is admitted when the same point is at issue between the same parties whether the prop.y be identically the same or not, if it happen to depend on precisely the same terms — And even, if but one of the parties was to

Of Written Evidence

parties to the former suit, if the point was the same in issue at both trials, & the one who would take advantage of the verdict would have been injured in his title had the verdict gone the other way, & the one to whose prejudice it ~~was~~ is introduced was so a party to the former suit, either as principal or vouchee, that he had the privilege of crossexamining witness & a right of redress if the jury had acted corruptly — as if A. should sue B. the Lessee of C. in eject^t., & B. should have a verdict, & afterwards B's, term being out C. should lease the premises to D. & then A. should sue him upon the same ground he did B., D. might give the verdict in favor of B. in evidence against A — But if the last action be of a criminal nature the verdict in the former civil suit is not admissible because it requires stronger evidence to convict a man of a crime, than to find an issue in a civil suit against him — When a verdict is given in evidence, the record of the process & judg^t must attend it to shew its legality — In some cases however an Ex^n. issued from another Court or in a former cause is good evidence without shewing a judg^t., but this will never do for one who was Plff in the Ex^n. for it might be that it was gotten fraudulently or irregularly, therefore he must shew the judg^t. too — As to the case in which shewing an Ex^n. only, shall be deemed a sufficient justification to an Officer acting under it, it seems to be settled that if it appear on the face of the Ex^n. that the subject matter was prop^ly before the Court, the Ex^n. is sufficient to exculpate the Officer whether the judg^t. of the Court be just & regular or not — but when this does not appear with certainty on the face of the Ex^n. but only that the subject matter might be properly before the Court, it does not seem to be thoroughly settled by the Eng. Books

whether the Offr. is justifiable, if it on examination appear that the Exn. issued on a case not properly before the Court — as if in Conn. an Exn. be issued by a justice of Peace for 20 Dolls. damages, this if rendered on confession or on Note with two Witnesses would be regular & legal but if on an action of trover would be void, the matter being coram non judice; but there being no distinction in the appearance of the Exns., the Officer according to the decisions in this State is holden harmless for executing such void Exn.; but if the Exn. had been for 80 Dolls. it is irregular & void on the face of it & the Offr. a trespassor for executing it — This point however in Eng. has recd. contradictory decisions, the doctrine

10 Co. 76. of the Marshalsea case being that a void Exn. cannot protect an Officer tho' an erroneous one may, however

2 Ld Ray. 229 is contrary, holding that if nothing on the face of the Exn. appeared irregular, the Offr. was excusable — the doctrine of the Marshalsea case has however been supported by subsequent decisions & seems to be the prevailing doctrine in Eng.; tho it is believed not, in this State — When any kind of process is introduced as evidence the Copy must be certified, except it be a writ issued, but never returned which therefore can not be certified, or the comparison sworn to, it not being on record — & in this case other testimony is admissible to shew that such a writ did exist — A Court of Chan. not being strictly a Court of record, its proceedings are not to the same extent admissible evidence in a Court of Law, that the records of a Court of Law are — The bill filed in Chan. cannot be

introduced by the filer of the bill, as evidence
a trial at Law between the parties, tho' it may be
introduced as evidence against him by the adverse par
because the things suggested in the bill making ag
-st the Pltff in the bill, being his own confessions a
supposed to be true, in like manner as any thing
party has said in conversation out of Court may be
introduced against him — So the answer of a Deft.
Chan. may be adduced in evidence against him,
not for him, in a Court of Law — & when used is of
higher nature of evidence than the bill, for the answ
is put in on oath, & will always be taken to be
so put in unless disproved by the other side — But
the answer of an Infant by his Guardian cannot
be afterwards read in evidence against the Infan
in a Court of Law — An answer to be read in eviden
must be accompanied by the bill, to shew that it
was regularly put in & proceedings had upon the
case in Chan. unless it be in proof that the bill
was lost, which cannot well happen now as all pro
-ceedings are late years regularly registred in Chany.
When an Affidavit is offered in evidence it must be in proof
that it was duly sworn to —
The mode of proof in Chan. is generally by Depons; the
are taken by examiners appointed out of Chan. who exam
& write down the testimony of the witnesses, which are
afterwards read on the trial, & little or no viva voce te
-mony used — In Courts of Law on the other hand little o
no testimony other than that is used; tho' by agreemt. of partie
Depons are some times used; & some times the Court in orde
to compel a party to suffer his antagonist to take depons w
the witness is abroad & can not be had, will continue the
cause from term to term untill he comply, if it be his interest to get a
trial —

Of Written Evidence

Depons when taken & used in Chan. (for it is necessary that they be used) are admissible in a Court of Law upon the same point & between the same parties, or privies to the contract, so that the party against whom they are has had a chance to cross examin the deponent; but yet the depon. under such circumstances even, can not be used unless the ~~wit~~ deponent be dead or is out of the realm or through sickness or other inability can not attend – & in many cases where it is likely to become necessary to rely upon this kind of proof, the party will file a bill in Chan. so that those depositions may be ready & admissible evidence in a suit at Law, to be brought when the depons. are dead or cannot be produced –

The examination of Witnesses in perpetuam rei memoriam is by an application in Chan. to have commissioners appointed for that purpose, if the applicant is himself in danger of being sued at some future period; he is entitled to this safeguard if the witnesses be advanced in life tho' in good health & not about to leave the realm; but if it be the intention of the applicant to institute the contemplated suit himself, he must make proof of the witnesses proposed to be examined, being in immediate danger of death from great age or infirmity, or of their being about leaving the realm speedily. this testimony too, when obtained is not admissible untill the happening of the contingency it was designed to guard against –

Our Law respecting proof is different from the Eng. – it is in Conn. the same as to mode in Law & Chan., in both Cour. Depons. are admissible in Civil causes if the witness live more than 20 Miles from the Court, the adverse party being notified to attend if within 20 miles of the place of caption by themselves or atty; & if the witness be mat

to attend Court, or about leaving the State his depon may be taken tho' within 20 Miles of the place of the Court; but personal attendance of a witness may be compelled tho' more than 20 Miles from the Court if the Suitor choose it, provided the witness be amenable to the process of the Court.

By Stat. our Sup. Court are impowered on petition to issue a Dedimus potestatem to proper Comrs. to take testimony in perpetuam rei memoriam; the Comrs are to notify the parties & take the Depon. of such persons & such only as are named in the Commission.

When the judgt. of a Court having competent jurisdiction is adduced in Evidence it is conclusive evidence to establish the fact to which it is adduced, unless the judgt. has been legally vacated, with this one exception, that if that judgt. was obtained by fraud the adverse party may be allowed to shew it; for the fraud being the practice of the party & unknown to the Court, it is no impeachment of the Court to shew it.

Foreign judgts. (among which in Eng. are ranked those of the Colonial Courts) when offered in evidence are not of that conclusive nature which others are, but yet are a sufficient ground to bring debt or indeb. ass. upon without shewing the contract or consideration upon which the first indebtedness arose, & the burden of proof is upon the adverse party to shew that the judgt. was erronious, or that there was no consideration.

Doug. 1.

In this Country by the Constitution full faith & credit is to be given by the Courts of one State to the acts of those of the other; & it is apprehended the judgts. of the one is not to be considered in the light of foreign ~~cour~~ judgts. in the Courts of any of the others. The mode of recovering judg

Of Written Evidence

in this State against absconding debtors, & those judgts
being evidence & ground of a suit in another State
may produce mischievous consequences as the law now
stands - for if the debtor be out of the State an attacht
upon his propy left behind is considered as legal notice
& it is not necessary that actual notice should ever
be given - the same is the Case with a foreign attacht
to secure the debts due the deft. in the hands of his atty
agent factor or trustee - If the real Deft. does not appear
the Court must continue the Case at least one term,
that actual notice may be presumed to be given,
& then going upon that presumption the Court
gives judgt. whereon an Exn. may issue, or an action of
Debt on the judgt may be brought in another State.
It should seem then analogous to the rules of law that
as the Courts in rendering judgt. go upon the presump
-tion of notice actually given, that it might be competent
to the other party to shew that no notice was had, & so
the judgt. fraudulent & no foundation for an action of Debt
But our Supr. Court have held that in Case of a
foreign attacht. the judgt. is good for no purpose but
that of suing out a scire facias against the garnishee
& that it is not such a judgt. as will support an action
of debt, & so not evidence; neither is it such a judgt. as
an Exn. can issue upon against the orig. debtor; but
that the first contract ~~remains~~ or security remains to
bring a fresh suit upon if the scire facias fails - this doc
-trine however if we hold certainly cannot stand the test
Of things of an inferior nature directed by law to be
recorded as marriages &c - Mere matters of
record cannot be proved but by themselves, or a duly

authenticated Copy; unless the actual destruction of the record be proved, but in these matters it is otherwise for it is sufficient in order to have oral testimony admitted, to shew that no record can be found, without proving an actual existance & subsequent destruction. It frequently happens that registries of marriages & births are not kept as the law directs, or that such events are not entered in the registry; then in Case of marriage the Certificate of the officiating Clergyman or justice predicated on his private record is good evidence - So too any private memorandum of a birth as in the leaf of an Almanack or the like is better to ascertain the time than oral testimony; but when these fail, oral testimony in all these & the like cases are admissible; & it is in practice in our Courts to admit oral testimony even without shewing that there is no entry either public or private, of the event -

A Deed in its most comprehensive sense is any specialty, as well as a conveyance of land - In England it is necessary in all pleadings counting upon a deed, to make a profert of it, or to state the reason for omitting it which is ~~only~~ that it is lost & destroyed by time & accident; or that the pleader is not in law supposed to hold the deeds they belonging some other person - as if the contest involve the title of a Widow to dower, it is enough in such case for the Widow to shew the assignment of her Dower, she not being entitled to the custody of the title deeds ~~who~~ which belong to the heir, & if the adverse party will contest the validity of such deeds, the burden is on him, & he may compel the production of the deeds by a duces tecum

Of Written Evidence

In Conn^t. tho' obliged to produce the deeds in Court the same as in Eng. yet a profert is not essential in the declaration or pleadings tho' usually inserted- All deeds being in this State recorded the person not having the custody of the deeds may have a Copy from the record, & must consequently use it when they relie on a title under such deeds - But if the validity of the deed be challenged as ~~if~~ that it is a forgery or the like, the orig^l. must be produced & the Eng. mode by duces tecum must be resorted to if the deeds are witholden -

In Eng. the orig^l. deed & not a Copy is evidence. It is not only necessary to produce the deed in question but to prove its execution & delivery, & that too by one of the subscribing Witnesses if alive & to be had, if not prove their hand writing - But if a deed be 30 years old & the possess-ion has always gone with the deed & not been disputed it needs no proof of Execution - If there be sufficient evidence of a deeds being lost or destroyed, & proof or a Copy may be given in evidence, & if the deed be in the hands of the opposite party a Copy may also in such case be given in evidence as pro proof of its contents, & it will be taken for true if the party holding the deed do not produce it, but being produced it destroys all evidence disagreeing with it - But if in the hands of a 3^d. person the party who wishes to prove its contents must procure it by means of a duces tecum if not by other means - The Stat. in this State requiring an acknowledgement of deeds is a great safeguard, & the ack-nowledg^t. furnishes no small evidence of a due execution. delivery however does not always accompany, or pre-cede the acknowledg^t. - The Stat. also requires 2 Witnesses the oath therefore of one at least of these if to be had is necessary-

to prove the execution & delivery of the deed; & if d[e]
or not to be found, their handwritings must be prov[ed]
But yet execution & subscription does not always
prove a delivery, because an express delivery do[es]
not always accompany these ceremonies - but
yet if a deed be finished purporting to be sign-
-ed & delᵈ in presence of the subscribing witnesses
it is accounted sufficient proof of a delivery, unle[ss]
the grantor makes use of express negative wor[ds]
as these, tho' this is my deed you shall not have
it at present; or you shall not have it till you hav[e]
done some certain other thing, or the like -
According to Gilbert the comparison of hands is evid[ence]
in civil but not in criminal cases; but according
to other writers it is evidence in both cases tho' weak
evidence - our Courts receive it in civil, but per-
-haps never in criminal cases, unless in a
collateral way, as to prove that it is not the wri-
-ting of the person whose name is in question
According to our practice copy of the Record is admissib[le]
evidence of a title; but this is very loose; for a deed obtain[ed]
by covin may be placed on the Record for a true one
& nothing to the contrary can be learnt from the Copy
It is a principle established that many things may [be]
evidence of fact to a jury of which a Court can take n[o]
notice, as for instance, a deed of 30 years standing wh[ich]
possession has accompanied the title, will be presum[ed]
generally speaking to have been duly executed & deli[vered]
(there being nothing shewn or appearing to rebut the presumptio[n)]
but yet if the Jury find only the execution of the deed but sa[y]
nothing about the delivery. the Court will not supply the defe[ct]

for altho' furnished with the same presumptive proof that would have warranted the jury in finding a deli-very, yet the Court cannot make the same inferences- this is doubtless good law, tho' the reason of it cannot be so confidently asserted— A Deed without subscrib-ing witnesses tho' it conveys no land, may be good as a Covenant against the maker of it & damages adequate to the injury sustained may be recovered. And if the grantee under such imperfect deed be put into possession, the grantor cannot eject him, because Chan. would interpose & compel the grantor to compleat the title on a bill being for that purpose filed; & when that is the Case law will not assist such grantor ~~to~~ profiting by his own wrong— A devise of land subscribed by three Witnesses in presence of the testator & in presence of each other, may be pro-ved by the oath of one of them deposing to the execu-tion of the Will & of the attestation of the other witnes-ses; but if the witnesses did not subscribe in the presence of each other the proof would be defective— When all the witnesses are dead proof of their hand writing is sufficient & the best evidence— If a rasure or interlineation be made on a deed by a third person, if the alteration in the sense be not material, the deed is not thereby invalidated, but if made by the grantee it avoids it tho' ever so small— An essential alteration made after the execution of a deed tho' with the consent of the parties will vacate the deed— In Eng. it is holden that the breaking off a seal tho' by accident vacates

the deed, unless such accident happen in Cour[t]
& if the deed be a joint & several one all the obli-
-gors are released by such accident tho' to the seal
of one of them only: but if the Obligation be sever[al]
the breaking of the seal of one is no release to the o[thers]
This doctrine of deeds being vacated by an acci-
-dental violation of a seal may well be questi-
-oned in our Courts where it has not rec^d. the sanction
of a judicial decision — When there is a deed of conv[ey-]
-ance of propy which might well pass without the
deed, & that deed be altered by the holder, still the
propy in the thing remains unaltered by such mu-
-tilation, altho' the evidence of the conveyance by
the deed is thereby destroyed —
As to Notes & other evidences of debt not under se[al]
it is not in Eng. necessary to declare upon them
but they may be given in evidence in an action
of Ass^t. upon the Contract — In this State the
suit must be upon the note or security, all being
considered as specialties, with this one exception
vizt. in an action on Book, a rec^t. for any of the
articles ch^d. is admissible in evidence, & is never
made the foundation of a seperate suit, or at least
need not be — from principle this indiscriminate
practice does not seem to be necessary — In all cases where
the security is expressed to be for value rec^d, & the consid[er-]
-ation is kept out of sight, the security ought to be consi-
-dered as a specialty & declared on accordingly, for
this seems to be the true criterion to determine whether
it is a specialty or not — And on principle, when the
security details the consideration, ass^t. should be the action —

Of Parol Evidence

There are ~~several~~ grounds for the exclusion of testimony as Want of integrity in the witness — want of discre-tion, ~~[illegible]~~ interestedness &c. — Such persons as are interested in the event of the suit are unquestionably inadmissible as a genl. rule — these are not only the parties to the suit, but also all who by legal consequence or private engagements in any way, are so circumstanced ~~as~~ that they will lose or gain by the event of the suit depending —
Interestedness in the question does not imply an immediate prospect of gain or loss in the case depending; but all such as have, or in prospect have a suit depending upon the same principles are supposed to be interested in the question: as if A. beat B. & be prosecuted for the battery at the suit of the king, if B. have a suit or is about to bring one against A. for the battery, he is said to be interested in the question, being interested to get A. convicted, for his ~~own~~ own success depends upon the fact of A. being guilty of the battery; the record of such criminal prosecution & trial cannot however be given in evidence in the civil suit — The ancient Eng. authorities differ with respect to the admissibility of witnesses thus interested in the question, but it is now fully settled that they are admissible, unless the questions be so situated that the verdi-ct in the first case where the witness was only inte-
3 Term Rep. 27 rested in the question might be given in evidence
4 Burr. 2251 in the subsequent case where he was interested in the event — In Eng. interested in the question then goes to the credit only

Of Parol Evidence

*This is not now the Case. Odd. 1st Day.

In Connecticut interestedness in the question excludes a witness as well as that in the event of the suit. According to Eng. principles the members of a Corporation are generally speaking inadmissible in a case to which the Corporation is a party: but there are exceptions to this rule, as where the members of the Corporation would probably be as much advantaged as injured by the success of the adverse party as if a town be a Corporation for the purpose of maintaining a Bridge, & are sued for neglect in that behalf. in this case the individual members who may be, & are as much interested for the prosecutor, as for the defence of the town, are admissible witnesses but this is when the interest of the witness is supposed to be balanced - the same rule holds when the gain or loss of the Witness will be equal in either event of the suit — But if a private action be brought to recover money from a Corporation for an injury already sustained, the members are inadmissible Witnesses for the Corporation, altho' their interest be balanced - The members of a Corporation are admissible to prove a donation to the Corporation, when what was given by the donor, would not have been necessarily supplied at the expense of such Corporation, but if it was a necessary article which must otherwise have been supplied at the expense of the Corporation, they are not admissible — By adjudication of Courts the Law in this State is different upon this subject from the Eng., admitting members of a Corporation to be witnesses for the Corporation, with the exception however of the Agent who carries on the suit - ~~So where the~~

So too when the ~~testimony~~ of a member is offered to establish a contract of such a nature as is usually committed to writing the evidence is inadmissible. In cases where the design of a Stat. would be defeated if all interested persons ~~the parties~~ were excluded, they are ex necessitate rei admitted, as upon prosecutions upon the Stat. of Winton &c. for without admitting the testimony of the person principally interested the Stat. would be a dead letter — In this State the practice is gone into — but in the Circuit Court Judge Jay refused to adopt the practice saying that "if Congress had made a Stat. that would not work they must mend it" —
In actions of Account both parties are admitted to testify, & perhaps in Eng. the party is not in any other case admitted except to save a Stat. as before mentioned — In Chan. from the nature of the proceedings the Deft. is always a witness for he puts in his answer on oath, i.e. if he chooses to answer at all — but the Pltff is not, unless the Deft. choose to make him so by filing a cross bill for the purpose of appealing to his conscience — At Law if a Witness refuses to testify, except it be to criminate himself, he is punishable for a contempt of Court — but if the Deft. in Chan. refuse to answer on oath it is no contempt, but the bill is taken pro confesso — not however if the required answer would subject the Deft. to a penalty, unless the Pltff wave the penalty which he may do if coming to him — but if it goes to the public he cannot wave it — This exemption from answering does not go to excuse one merely because his answer would shew him to be guilty of an illegal ...

Of Parol Evidence

In the action of Book ~~debt~~ which is peculiar to Conn all interested persons are allowed to testify — In Eng upon a quantum meruit, the Book of the party is allowed to be brought into Court & may be substan-tiated by the oath of disinterested witnesses but not by the testimony of the party — In an action of Book debt a collateral fact is not allowed to be prov by the oath of the party; as if the Deft. offer to prove that another was in partnership with him in contracting the debt & thus to get rid of the suit by abateing the writ, the proof must come from other sourses than his own oath — In an action for a secret assault the person assaulted & who brings the suit is allowed to testify as to the beating & the thre-nings &c previous thereto, but no further, for the con-sequences can be proved by others — in all such like cases witnesses are allowed ex necessitati rei —

In an action for trespass upon the realty there is something singular, for after adducing witness-es to render it highly probable that the Deft. is guilty, the Plff may be admitted to swear that he believes the Deft to be guilty, upon which he will be deemed to be guilty ~~unless~~ unless he will then swear that he did not do the trespass after which the Plff can not go on to shew that he has sworn falsely, but the Deft. must be acquitted. But in prosecutions upon the night law the Plff is allowed to testify his belief of the Defts guilt & then if he denys it, whether on oath or not, the Plff may still go on to substantiate his charge — When one ~~in Cont.~~ suffers by receiving counterfeit money from a person who is also ignorant of its being counterfeit, it is doubtful whether he has any relief at Common Law

Of Parol Evidence —

but by a Stat. in this State relief is afforded — the pro-per Court is empowered to call both parties before it & examine them on oath — When a principal witness is made a Deft. for the purpose of preventing his testifying if upon the trial no proof is made against him, the Court will order his name to be struck out of the writ & allow him to be sworn; but if there be any evid-ence against him the Court will not strike out his name, but will on motion direct the jury to consider his case first, & if they find him not guilty the Court will then admit him to testify —

The law prohibits husb. & wife to be witnesses either for or against each other, & the Court will not even suffer such evidence to be given by consent both of parties & witnesses; neither can the wife swear against herself if it be to the injury of any right the husb. might have in her propy — The exceptions to this rule are first, in the Case of high treason in Eng. the husb. or wife may be compelled to testify against his, or her companion — but it is not known that this exception has been adopted in this Country — 2dly when there is a complaint of one against the other for the purpose of obtaining sure-ty of the peace or good behaviour — 3dly where one is prosecuted for a secret or private assault upon the

Edwards; Cox Hats; 3 Ra. 633

other at the suit of the public, the one assaulted is an admissible witness against the other — No relations except husb. & wife are excluded from testifying —

An atty is not compellable, nor is he permitted to give evidence against his client of any fact which his client has disclosed to him as his counsel, nor may he be questioned concerning it lest his silence should prejudice his

Clients interest, & this is the privilege of the Client rather than of the Atty: But any thing which the Atty has knowledge of independent of the communication of his Client, he is Compellable to disclose — In this State a usage has obtained prohibiting the Atty to testify what the adverse party has told him, provided the confession was made in consequence of the cunning & address of such Atty in drawing it out of him. A particeps criminis is an admissible witness to convict his accomplices, but — In civil actions of trespass a particeps criminis may be improved as a witness against the one made defendant, & yet this seems to be swearing for himself or at least for his own interest, for by fixing the trespass upon the Deft. he screens himself from liability, a judgt. against one being a discharge to the rest — Ones own voluntary confession against himself is proper evidence to be introduced either upon a civil or criminal trial; but what one has said in his own favor either before or after the action commenced can never be given in evidence — & ones confessions if extorted by fear or drawn out under pretence of propositions of settlement cannot be used against him — When one arrested on criminal process is examined before a Majestrate such majestrate may give evidence of such examination on the trial, but none other can be admitted to testify respecting it: & in Eng. such examination must be in writing or it cannot be proved by the Majes

Of Parol Evidence

When a Witness is dead what he testified under oath may be proved in Court, but what has been said by a man while living without oath cannot be proved, unless it was said in contemplation of speedy death, & death as was by him expected did ensue — So what one in his lifetime had been heard to say respecting the general repute, as for example what an old man had been heard to say concerning where an ancient highway ran or the like — So too what a Parent has said about the age of his Child, may be given in evidence even in these latter instances if not said in contemplation of death — It is admissible to give in evidence what a living & present witness swore upon a former trial, only for the purpose of impeaching his testimony; or if attempted to be impeached in this way, to shew that it was consistent with his present testimony. But what one has been heard to say in conversation may be given in evidence either to invalidate or strengthen his present testimony — Such persons as have been convicted of any species of the crimen falsi, are for want of integrity excluded: this consists of all those crimes which shew a total want of veracity & integrity, as theft, forgery, perjury, barratry cheating &c: there are many crimes of a not less heinous nature which do not from a conviction exclude, they not discovering the species of turpitude which go to the constitution of the crimen falsi; & the record of the conviction of such crime is the only evidence to shut out the witness

3 Burr. 1253.

Of Parol Evidence

Altho' it is the rule that a conviction of the crimen falsi in Eng. is in all cases except that of a pardon a perpetual disability; yet it has been holden in this State that a person who had been in his youth convicted of a crime of that discription, but afterwards for a long course of years maintain-ed a good reputation for integrity, should be rec. to testify such record notwithstanding — In all cases except, where a Stat. forbids it the effect of a Pardon in Eng. is to restore the persons credit. in this State it is said. that it has been determin-ed otherwise = In ancient times infidels could not in Eng. be admitted to testify; but now any religious sect sworn according to the customs of their respective countries may be admitted whether Christian or pagan — Atheists, & perhaps professed Deists are excluded — Quakers are admitted only in civil cases unless they will be sworn — Excommu-nicated persons & Popish recusants too are excluded in Eng. by Stat., but not in this State. & even Quakers are here admitted upon affirma-tion in both civil & criminal cases — Our forms of oath being equally binding upon the consciences of all who believe in a God, no difference of the mode of administring the oath is required — but Atheists having no tie imposed upon their consciences by an oath are excluded — Where ever the civil Law prevails two witnesses or what is equivalent to two is required to establish a fact. But at Common Law the oath of one witness swearing positively to a fact is sufficient, with

a few exceptions - In case of high treason two witnesses are requisite to produce a conviction, but even if it be to different overt acts it is sufficient In an indictment for perjury two witnesses is al-so necessary; & in Chan. when there is but one wit-ness for the Pff, (& without corroborating circumstances) to oppose the answer of the Deft
1st Bro. C. 51 which is put in on oath, there being oath against oath, the Court will not decide but usually send the Case to a jury to decide, directing the answer of the Deft to be read in evidence - Our Circuit Courts govern their proceedings by the same rules, but the Courts of this State when exercising Chan.y powers judge of the balance of evidence without the aid of a jury - At Common Law, generally speaking no rules can be established relative to the quantum of evidence neces-sary to the establishment of a fact - presumptive evidence is often deemed sufficient without any posi-tive proof - It must principally depend upon the discretion of the triors - What presumptive proof shall be deemed sufficient to raise a violent pre-sumtion according to the deffinition given of such presumption, it is not easy to decide; indeed evidence of the highest nature almost, seems neces-sary; & even the Case of the bloody sword which is always cited by way of illustration, hardly comes up to it - Presumptive proof ought always to be proceeded upon with caution; & yet ~~it~~ is often quite sufficient to establish any fact however important - In this state by Stat. it is ordained that no person shall be put to death except by the testimony of two witnesses, or by

Of Parole Evidence

that which is equivalent to it; so that the positive testimony of one witness however credible if entirely unsupported by any corroborating circumstances, will not be sufficient to warrant a jury in finding a man guilty of a capital offence —— Hearsay evidence is never admitted except for the purpose of impeaching the credit of the then deposing witness by shewing what he had said before; or to matters of tradition respecting things of common report or the like as having been spoken of by persons who are dead.

3d Ter. Rept. 707 –

But when the character of a witness with respect to veracity is enquired into, the testimony is in its nature hearsay, it being what the opinion of people is relative to the point which is the subject of the enquiry, & not what the witness private opinion of the persons true character is, of whom he is called to depose —

Generally speaking a witness is not to give his opinion but only to state facts; yet these are in many cases so intimately interwoven with matters of opinion that it is unavoidable to state the facts without giving also the witnesses opinion & probably if it were tolerated to give evidence of the opinion the witness entertained of the transaction, in some cases; it would ~~perhaps~~, be more conducive to justice — No other blemish except the want of veracity can be allowed in evidence to destroy or weaken the ~~of the~~ testimony of a witness: unless the party producing him first attempted to prove him to be a good character, in which by way of impeachment it may be otherwise proved to be bad — formerly it was otherwise in this State —

Of Parol Evidence

No certain rule relative to the age of Children admitted to testify can be laid down, for it depends upon the descretion of the Child, especially if below the age of fourteen - the Common Custom of Courts is to examine into the mental qualifications of such Child, when offered, & if he appear to be sensible of the nature & consequences of an oath, he is admitted: sometimes Children are permitted to relate facts without being sworn -

There are two modes of finding whether a witness be interested or not, first by the testimony of others & 2dly an examination of the Witness himself under the voire dire, which obliges him to answer all questions except as to the principal fact in issue in the case - & if it appear that the witness is interested, or only suppose himself so even; or if he consider himself in honor bound to the party by whom he is introduced to pay a part in case of loss by the suit, tho' not legally liable, he is inadmissible - But after the party has attempted one of the foregoing methods of proving the interestedness of the witness, & failed in the attempt, he can not resort to the other mode -

Sha. 129

The method of getting a witness into Court is by Subpoena signed by a Majestrate being served upon him & tendering his legal fees for travel & attendance at least one day & if required longer his attendance from day to day must be tendered in order to subject him for non attendance In which case he is liable in damages to the party injured, & to a fine to the public - In order to have his action against such witness, the party agrieved must have him called in Court & a record of his non appearance

made, which is the only admissible evidence of the non attendance of such witness —
Those cases in which interested persons are allowed to testify ex necessitate rei, are when a Stat. would otherwise become nugatory as the Stat. of Winton &c, when a Stat. specifically directs the admission of such evidence as our Stat. of Book debt &c — In actions of Acct. the parties are admitted as to their accounts. One who escapes may be a witness against the Sheriff in an action for a voluntary escape, interested, for the Creditor having recovered of the Sheriff the witness would be free from liability = so in an action against rescuers, the rescued is allowed to testify — An agent is allowed to be a witness for his employer to prove any business done by him in that capacity — When there are several trespassers, one is admissible to testify against the rest, tho' interested in producing their conviction to secure himself from an after suit — Upon complaint to obtain surety of the peace — for secret abuse & assaults — prosecution upon the Stat. of bastardy — in this State the Stat. mode of recovering for having rec.d counterfeit money, trespass upon the realty — prosecutions on the Stat. for theft — in the foregoing & perhaps some other cases by Stat. provided interested persons are to a certain extent allowed to testify —

3 Fre. Ap. 27 An interested witness may by releasing his right or by being released from liability by the person to whom he is or, might in the event become liable, may be rendered competent to testify —

Of Parol Evidence

If one who is a material witness become interested
3d Tr Rep 27 Stran. 1.106 .52 after one party has a right to his testimony, such party shall never theless be entitled to his testimony unless he had a hand in creating such interest—

A witness in Court may make use of memoranda for the purpose of refreshing his memory as to particulars provided he recollect the substance of the matter independant of such aid— but if he recollect nothing but from the memoranda his testimony cannot be admitted, tho' it is said his memoranda may be introduced—

If a witness being subpoenaed & his fees tendered, refuse to attend
Doug. 540 Court he is liable to an attacht. to bring him in, & to answer
Stran 512 as for a contempt in disregarding the summons—

Doug. 134 When an Exr. is but a naked trustee having no interest under the will he is an admissible witness— if one offers evidence of a lower nature than is admissible if the Court perceive that it makes against the person offering it they will admit it—

It is a general rule that the subscribing witnesses to any instrument must be called to prove it if living & within reach of the process of the Court: if not their handwriting must be proved as the next best evidence— In Conn. the rule is the same, but in practice greater indulgence has been allowed in the introduction of secondary proof than in Eng.— The testimony, however, of subscribing witnesses
1 Blac. 365 3d P. Wil. 396 may by the opposite party be contested by adducing other contradictory proof— If a person not interested be sworn & his Depo. used in Chan. & afterwards he become interested
3 Ray 1008 & a suit be depending such Depo. tho' taken when he was disinterested cannot be used in such deponants favor—

Of Parol Evidence —

When one publishes by writing or ore tenus merely that prop^y. ~~about~~ which he is about to vendue is free & clear of all incumberance, any subsequent declaration of a less public nature of a particular
1 H. Blac. existing incumberance will not be rec^d. to do away
187 — the more public & solemn assurance —
A person who has by his signature contributed to give credit & currency to a negotiable instrument as the endorser of a bill of exchange, can not after-
1. 2 Ter. Rep. 296 — wards be permitted to give testimony to discredit it — When a general character is put in issue, whether by the pleadings it tends to a recovery a defence, or is designed to go in mitigation only, both particular facts & general reputation may be enquired into — But it is not admissible to make enquiry to furnish evidence of a probability that the thing alledged against the character so put in issue, was done by such person as for example — A. sues B. for charging him (A.) with theft, & for the purpose of proving B. guilty offers evidence of his being a slanderous person this is not admissible; but on the other hand B. may prove that A. has committed theft for that will be a justification; & further, as A. has put his gen^l. character in issue, B. may prove that his gen^l. character is that of a thief for this if not so fully proved as wholly to exonerate will go in mitigation of damages — Again A. sues B. for debauching his daughter, B. may give in evidence previous acts of prostitution in the daughter for her character is put in issue, & if proved to be bad it is a defence —

Of Parol Evidence

It is a rule in evidence that affirmative testimony is to be credited when opposed only by negative- doubtless this rule admits of many exceptions, for negative proof will often be credited at the ex- -pence of ~~positive~~ affirmative; however, ceteris pari- -bus, the rule is just- It is a rule that in the course of pleadings the one who ~~makes~~ takes the affirmative of the issue is first to proceed with the ~~evi~~ proof to substantiate his allegations; but yet where the presumption of law is against the facts alledged; as where one accuses a public officer with neglect of duty the law supposing the contrary, viz, ~~that~~ affirmatively, that he has performed his duty, requires the negative to be proved- The substance of the issue must always be proved- In the application of evidence it is the com- -mon practice for the one party when he conceives the evidence given on the other side insufficient to main- -tain the issue to leave it to the Jury to determine, but it is not necessarily so, for he may if he plea- -ses demur to the evidence, which admits the facts testified of to be true, but denies that they are suffi- -cient to support the issue; & if it be written testimony the other side must join in the demurrer- but if it be parol testimony the party offering the evidence is not bound to join in the demur- -er, & of course in such case the jury must decide-

Vide No. 6 p. 96-

Of Bail – according Cont. usage –

Bail in its appropriate sense relates only to common & Special bail with reference to our arrestes, but in its more extensive significa-tion it comprehends other kinds of bonds –

As it respects the Pltff – When one brings forward a suit by way of summons & in the opinion of the Court he is not of sufficient ability to respond the Cost if the Case should go against him, the Court will on mo-tion direct such indigent suitor to find surety to the satisfaction of the Court to pay the Cost in every event; this is commonly called bonds of prosecution: & when it is manifest that the Pltff a bankrupt it is the duty of the Justice who is-sues the writ to make the Pltff find surety at the time but this is not commonly practised – If on trial the Defᵗ. obtains judgᵗ. in his favor for a bill of Cost he must firstly take out an Exⁿ. against the Pltff which if satisfied the bail is discharged; but if there be a non est return as to the goods of such Pltff (for he is not obliged to take the body tho' he may if he will) the bondsman becomes liable – & is suable either in Debt or Scire facias upon the recognizance – & even if the Credʳ. in the Exⁿ. (the orig. Defᵗ.) take the body of the prinˡ. & he swear out of gaol, still the money may be collec-ted out of the bail in the manner above mentioned for it is incident to such a recognⁿ. that it is never discharged untill such bill of Cost is paid – Again a Pltff tho' not indigent if he be not an inhabit

Of Bail — according to Conn. usage

of this State, must give bonds when he issues a summons: & every one whether rich or poor, an inhabitant of Conn. or not must give bonds of prosecution whenever he takes out an attacht.—, & the recog. must be taken by the signing authority— Doubtless the orig. meaning of this was that some one should become liable with the Pltff as his surety, not only for the purpose of securing to the Deft. his Cost; but also to prevent oppressive & vexatious suits; but in practice it is usual to take the Pltff's owne bonds only unless manifestly insufficient— this however seems rather a vain ceremony in such case, for the Pltff by such recogniz. incurs no greater liability than he would be by a judg. & Ex. against him without such precaution— the practice has however been sanctioned by adjudication of Court—

Shall appeals the appellent must give bond with surety must be given to answer the damage of not maintaining the appeal: this is the Costs of suit only or the damages & costs as the Case may be— For when the appellant pursues the appeal to judg. in the upper Court, the bondsman is liable in default of the principal, to the Costs of suit only, tho' it must be the whole cost from the beginning of the suit: but if the ~~bonds~~ appellant (being the Deft) neglects to carry up his appeal the bondsman is liable both for debt & cost. for the first judg. is dead & of no force by the appeal

therefore in order to put the appellee in as good a situation as before, which is the nature & design of the bond, the bail must be liable for both debt & cost (the Deft. appealing) the appel-lee having lost his hold upon the appellant by the appeal — If the appellant be comes bankrupt while prosecuting the appeal it has not been determined whether the bond-man is liable for any thing more than the Cost. — It is necessary in case of the appellants finally failing in the suit, that the Exn. first go against the principal before the bail can be proceeded against: but yet if such princi-pal be put into jail & swear out, still the bail is not exonerated, untill actual paymt. be made

Bail as it respects the Deft.—

When any one is arrested for debt by attacht. & sufficient bail is offered for his appearance at Court the Officer is bound to take it & liberate the prisoner this is common bail, & if the debtor surrender himself up in Court or be surrendered by the bail, the bail is discharged; & even if there be no surrender in Court yet the bail is not liable untill a non est inventus return of the Exn. against the principal; for if before such return the principal be taken or surrendered by his bail to the Officer (which such bail may do) the bail is discharged, whether the Credr. obtain his pay or not — but if there be no arrest nor surrender of the principal untill a non est return, the bail is liable both for debt & cost —

Of Bail according to Cont. usage —

When a Debtor who has been at large upon common bail appears or is surrendered in Court, if desired the Court will commit him unless he enter special bail, which is by recog. in Court, & it is to answer for the appearance of the deft. at the rendering of final judg.t — the deft. then is allowed to plead — & if judg.t goes against him unless he surrender himself or be surrendered by his bail within the life of the Ex.n & before a non est return, the bail is exonerated; otherwise he is liable both for Debt & Cost — In Eng. & in the other States the bail may exonerate him self by surrendering the principal any time before judg.t against him (the bail) on Sci. fa. paying the Cost. of such process. Returns of non est are sometimes made fraudulently & without due search made, on purpose to subject the bondsman — In such case the bail would not be charged if the fraud was practised at the instigation of the Cred.r but if done by the mere motion of the Officer, the Cred.r is not to suffer for his covin but has his remedy against the bail, ~~but if~~ but the Officer would be liable in a suit to the bail — So an Off.r is liable to the person arrested if he refuse adequate bail; & yet if the bail taken be insufficient the Off.r is liable to the Cred.r, unless in case where the bail was at the time of acceptance apparently sufficient but during the pendency of the suit became insolvent in which case it has been decided that the Off.r is not liable

Of Bail according to Con^t. usage

In Eng. when a bail bond is forfeited the Sheriff has a right by Stat. to assign it to the Credr. who is obliged to receive it if sufficient, & such assignt. exonerates the Offr. but in Cont. the bond is always sued in the name of the Offr. tho generally speaking he takes no trouble about it ~~— this respects the~~ for the liberty of the yard ~~by means of the bankruptcy~~ ~~[illegible]~~, he is super–

The method of recovery upon such bonds is either by action of debt on the bond or by Scire facias issuing against the bail from the Court where final judgt. was rendered against the principal.

When ever propy. is attacht. either here or in Eng. it may be replevied if the Deft. can get sufficient bonds to prosecute his replevy & restore the goods in case of final judgt. against him – in which case an Exn. as in other Cases goes against the principal upon the nonest return of which the bondsman in the replevy is liable, to the extent of the value of such goods, but whether to any greater extent seems not thoroughly settled in this State, for while sound principal & justice support the idea of the liability extending to the amt. of the goods only, the words of our Stat. seem to favor the other construction – there can be no replevy of goods taken in Execution –

Bonds are necessary upon a writ of Error if the Pltff in error would stop proceedings on the Exn., & a service upon the Offr. of such a writ with bonds is a supersedeas to the Exn. & compels him to stop – & such bail is liable both for debt & cost – Bonds are necessary upon an audita querela, it being a supersedeas to the Exn., & as no new Exn. can issue on such judgt. the Bail is liable for debt &c.

Vide No. 6- p. 95

Of Bail according to Eng. usage

The person bailed becomes the prisoner of his
Bail & may be ~~by him~~ taken & surrendered to
prison by him, at any time even before the time
is elapsed for which he was bailed, altho' the bond by
such premature surrender is not discharged untill
the time of surrender specified in it arrives - For
such authority of the bail to imprison his prin-
-cipal no warrant is necessary, but to prevent
the interference of others to rescue the principal
it is necessary for the bail to shew his Bail piece,
but this is all the service it is of, for it does not
authorize the Bail to command assistance - In
Conn. we have no bail pieces but the Certificate of
the recog. by the Clerk of the Court may be used in its
stead - In this State there is no such thing as bail up-
-on an Ex., nor ordinarily so in Eng.; & yet when a per-
-son who has had judg. against him & is taken in Ex. &
sues out a writ of error, pending such writ the Court
will sometimes bail ~~the~~ such suitor -
A practice tho' not common, has obtained in Eng. of
a judge's taking bail before process executed by the Offr.
but this is by mutual consent of the parties - In
Eng. as well as here an Offr. must take bail on mesne
process when sufficient is offered, or he will be liable
to an action; but whether such action should be trespass
vi et armis or trespass on the case has been a doubt but
(20.) is finally settled in favor of the latter form both in Eng.
196. & here - In Conn. if the Cred. refuse to take the bond to the
officer & insist on suing the sheriff or other officer for
taking insufficient bail & it should turn out that the
~~bond~~ taken & offered to be assigned was sufficient & col-
-lectable he would be cast in the suit - But in Eng.
the Cred. is never obliged to pursue the bail to the Offr.; but he

may move the Court to order the Sheriff to bring
in the body, which if he neglect to do they amerce
him to the amt. of the debt & costs; but stay proce-
Vent. 55. 85 Ld Ray 425. ings untill he can have time to collect the
amt. of the bondsman for the debtor's appearance
& perhaps an action on the Case would also lie against
the Sheriff — When the demand exceedes £10
special bail is required, which in Eng. is bail to the Off. taken
out of Court by a judge on affidavit of the debt being due
& that it exceeds 10£. but in all actions sounding
merely in damages as Slander, trespass &c, & in those
for debt when the sum is less than 10£ common
bail only which is merely nominal is required.
But yet in some particular cases the Eng. Courts
have ordered bail to be given in actions sounding
in damages merely, but this is uncommon
Sid. 370 Roll 385 Lev. 39. & practised only when the delinquency of the deft
is great & evident — Bail is not demandable
in qui tam prosecutions upon a penal Statute
No attacht. goes against Exrs. & Admrs. therefore
no bail is demandable of them except upon the
suggestion of a devastavit upon a replication
this cannot happen in Cont. unless at the suit of
a legatee, & no practice of the kind is here known —
In an action against Husb. & Wife if the wife only
be taken she must be released on Common bail —
When the bond is forfeited the bail is liable in Eng. as
well as in Cont., but have a longer time to clear them-
selves, for if they surrender the principal before
on the Sci. fa. they are discharged on paymt. of cost of the suit
When the principal dies before the return day of the
writ, the bail is discharged; but in Eng. if he dies after
No. 6 A. 95 a non est, & before judgt. on the Sci. fa. the bail is not discharged

Of Bail according to Engl usage

If the Pltff does not file his Declaration with-
-in two terms after the arrest ~~&c&c~~ the bail
is exonerated & a discontinuance of the suit is
entered — In B. R. the sum is not specified in
the bail bond but only to respond the damages
& costs: in C. B. a particular sum is named —
It has been a question whether when judgt is
for the Deft the bail is discharged tho' such judgt
be afterwards reversed; but the better opinion is
Cro. J. 94 Moor 85. that the bail is not discharged —

The defences of the bail are that the principal
is taken in Exn, that Exn never issued against the
principal: that the principal appeared in Court &c
If after a non est return & a recovery against the bail
the principal may be come at, the Credr is at his election
to pursue with his Exns which he pleases; & if he in
such case levy upon the principal first & fail getting
Cro. J. 320 his money he may still pursue the bail, but if he
first take the bail he cannot afterwards pursue the princl

When there are several who give bail the
Creditor may bring his action against one or all;
for they are considered as joint & several
obligors — N.B. In Cont. it may happen
~~that the~~ Credr will have double security, as if
one ~~but~~ give bail to the Pff & do not appear in
the lower Court, so that the bail is liable for
Debt & Cost, & after appeal giving bonds on the
appeal, & be finally cast in the suit, ~~the~~ both
bail are liable, but the latter for cost only, & one or both may be
sued —

Of the Law Merchant &c

Law Merchant is a rule of conduct observed among commercial people not confined to one country only but pervading most or all the commercial Nations of Eur. & their Colonies in the other parts of the World - as also in this Country - It is often called the Custom of Merchants, but is strictly speaking not a custom but a common Law regulating mercantile trans-actions, different in some measure from the Com. Law of Eng. or of any other particular Country. It is taken notice of by Courts without being pleaded or given in evidence, as customs are - & as particular Customs vary the Com. Law, so particular local customs may vary the Law Merchant & must in such case be pleaded, as customs varying the Com. Law are - The Law Merchant is comparitively of late date having grown up with the commerce of Modern days, being formed by the Courts adjudicating in Mercantile mat-ters according to the Custom prevailing among Merchants in other Countries with whom the Eng. merchants had deal-ings - The Law Merchant is different from the Com Law in the following among other particulars; viz. in the former no consideration is necessary to the validity of a Contract - Any the least fraud in a mercantile contract vitiates it in toto, whether it be suppressio veri or allega-tio falsi; this however has relation to facts. & not to mere speculations = At Com. Law a fraudulent considera-tion merely, will not vitiate an obligation, tho' Chan. will in such case relieve: in Connecticut, however, it has been decided that when the consideration is a total fraud, no recove-ry can be had at Law even, upon the obligation or contract -

Again - it is a principle of Com. Law, that when a Credr. releases one joint Debtor from Exn. or otherwise, it operates as a release to all the other debtors, but in the law Merchnt. if one be taken in Execution & released or suffered to escape the Creditor may still come upon the other parties to such joint contract - it is said that in some cases in the Law Merchant parol testimoney is admissible to vary the operation of a writing but this seems a loose & indefinite exception - In the Law Merchnt. no such thing as survivorship as in joint tenancy at com. law is allowed, & the Exr. of a ~~joint tenant in com.~~ has all the power & property in the joint mercantile property that the survivor has, except the right of suing & the liability to be sued for the joint concerns of the Company; this right & liability

Sal. 444 survives & attaches to the surviving partner, altho' the propy. does not. When the survivor has sued for & collected a debt he is accountable to the Exr. of the deceased for his share; & on the other hand if their be a recovery against such survivor, the Exr. must contribute his share, but cannot be called on by any other but the survivor for such partnership debt, & this in Eng. is usually done in Chan. - Such Exr. may however in case of the insolvency of the surviving partner in Eng. be called on by an application in Chan. directly by the Credrs. of such partnership - In case of the death of both partners, the Exr. of the longest liver of them is the person to whom the Creditors must look to -

2. Bay. 265 If a judgt. be obtained against one as surviving partner it is still a partnership debt - If a judgt. be obtained against one of partner for his sole & seperate debt, the Exn. may be levied upon the partnership propy., but in disposing of the propy. the Offr. must sell only the undivided right of the debtor in the propy. taken, & the purchaser becomes

Sal. 392 a tenant in common of the propy. so sold with the other proprietor, coming into the place of the debtor -

Of Law Merch^t, Partnerships &c

In case of the bankruptcy of two partners, there is properly speaking three estates, the partnership estate, & the seperate estate of each of the partners- The rule in this case is that the Company debts are to be paid out of the Company propy, & each ones private debts out of his seperate private propy but in case of a deficiency of the company fund, & a surplusage of one or both the partners, such surplus propy is liable for unsatisfied company claims & such surplusage whether of both or one as far as requisite will be transferred to the company fund- On the other hand if after bankruptcy it appears that there is a surplus of Company propy, such surplus after partnership Creditors are paid, must be divided according to the interest of each partner in such surplus & proportion of each transferred to the seperate estate of each & be applied to the discharge of the seperate debts of each ——

Of Bills of Exchange

A bill of Exchange is an open letter of request to a correspondent to pay the sum specified in it- An indorsement of a bill may be in full or only in blank, which latter gives the holder a right to fill up the blank with the usual order of paym^t to the Drawee- & bills may be so indorsed from hand to hand in infinitum— Bills are drawn payable at sight or at single, double or treble usance, & this usance is different in different Countries but the bill always follows the Custom of the Country where payable- In this Country as well as in Eng.

thirty days is the usance established by Custom –
When a bill is presented for pay.t & accepted, three Days called days of grace are allowed (except in case of bills drawn payable on sight) at the end of which, if the Bill be not paid it must be protested for nonpay.t immediately & notice given to the drawer –
At com. law when Months are spoken of lunar months are meant; but in transactions falling un-der the regulation of the law Merchant, Callender months are the legal months – At Com. Law it has been much litigated, & the authorities are variant up-on the ~~point~~ true construction of the words in a writing from the date, & from the day of the date, it being rather supposed that the former was to be construed inclu-

Marshall 679 sive, & the latter exclusive of the day on which the writing was made, but it is finally settled that both forms of word had the same meaning & were to be

Cowp. 714 – construed to be inclusive or exclusive of the day of the execution, as from the whole tenor of the transaction seems most congenial with the true intent of the parties, & the furtherance of justice – But in the

Show. 829 Ld. Raym. 281 – Law merchant in such case it has always been held that in both forms of words the contract was to be construed as inclusive of the day –

N.B. In an action on a Pollicy Ld Holt Held from the day of the date was exclusive – See Marshall 679 –

When the last of the three days of grace falls on Sunday or some great holyday, the bill must be protested on the preceding day & not be allowed to go over to the succeeding day, which would be according to Com. Law regulations, which allows till the succeeding day to do y.e business

Of Bills of Exchange &c.

Sal. 129. L. Ray. 757. The Stat. of Ann first made promisory notes nego-
-tiable – And yet the principles laid down in
Vent. 318 & 32. seem to countenance the opinion entertained by
Mr Chipman & others that such notes were negotia-
-ble at Common Law, but the practice was never allowd
In Connecticut the Stat. of Ann being of no force
& we having none of a similar nature, notes
continue as at Common law not negotiable;* they
are however sold from hand to hand & the Courts
Countenance the practice, but yet they must be
sued for in the name of the original promisee –
this is an inconvenience, for on the one hand
the real Pltff may by his negligence saddle the
nominal Pltff with a bill of Cost; & on the other
the nominal Pltff can at any time release the
note, & so put the holder to a second suit for his
money, either against the releasor, or if he be
a bankrupt against the releasee for accepting the
release after knowledge of the assignment –
Tho the practice of making remittances by Bills of
Exchange & promisory notes is called the Custom
of Merchants, yet any person who makes such
those drafts ~~is~~ is considered quoad hoc, ~~a~~ a Mer-
-chant – An Infant is not bound by a bill of Ex-
Car. 160. -change or promissory Note negotiated, ~~ ~~ the
true reason is because the consideration of such
instrument after being negotiated can not be [enquired]
into, & even if on the face of the instrument it be
expressed to be for necessaries, it will make no odds
it being no guard against imposition –

* Now by Stat. otherwise

Of Bills of Exchange &c

In case of a Bill of Exchange the Drawee is the per-
-son to whom presentment is to be made for payt.; but in
case of a promissory Note, the maker of the Note is the
person to answer it, it being drawn on himself-
but (after endorsments are made the indorsors & inda-
-sees are in the same situation in both Cases-

1st Burr. 452 — A note or Bill drawn payable to one or bearer instead of to
3d do. 1516. one or Order is a good negotiable bill or note - but in
a Note of this kind delivery without endorsment is suffi-
-cient to enable the holder to receive the money:- it
is however requisite in an action by one as bearer
to shew that he gave a bona fide consideration for the
bill — Bank Notes are considered as money itself
to most purposes: if they be stolen from the owner
the propy, notwithstanding such felonious taking, vests
absolutely in the first bona fide possessor into whose
3d Burr. 554 hands they come as is the case with Cash — In
Equity it has been resolved that they are a good tender,
& in law too, they are, if no objection be made to them at the
time of the tender — Bankers Cash notes or drafts pass
much as money, but have not received all the legal
sanctions calculated to assimilate them to Cash which
bank notes have — If A. pay B. a debt in one of these
Banker's notes, & the Banker fails, A. will have to bear the
loss unless B. has been guilty of some neglect in not
Stra. 416 550. 910 1175. 1248. seasonably presenting the Note after reception, or in not season-
-ably giving notice of the refusal of payt.; but what is a reason-
Lex Mer. 482 -able time in either case depends upon the nature & cir-
-cumstances of each particular transaction - It is not
necessary to alledge that a bill of Exchange was for
value received —

Of Bills of Exchange &c

2d Ray. 1361. Stra. 591 — A bill of Exchange must be drawn for Cash only
3 Wils. 207. 213. — & it must depend upon the personal credit of the drawee & not on any particular fund in his hands —

2d Blac. 7802 — But with promissory Notes it is said to be different, for such note will be a good negotiable instrument altho drawn on a particular fund — but this distinc-

5 D. & E. Rep. 486 — tion is denied by a subsequent decision & seems not wellfounded — The rule, however, relative to a contingency vitiating the bill or note is not absolute & without exception, for as between the first immediate parties to the instrument they are good, as, in the Case of a bill, between the drawer & payee, & in a Note of that description is good against the maker; they are defective only as to their negotiable quality — & even then if the fund be in its nature morally certain, a note the payt. whereof is predicated upon such fund will be good as a negotiable Note, & perhaps a bill of Exchange

2d Wils. 263. — also in such case would be supported as such; & if the payt. of either be contingent only as it respects the time of payt. depending upon an inevitable event as the death of a person, or even upon one of public notoriety & only morally certain. as upon the payt. of the wages due the mariners of a particular public ship, such Note or bill would be good — & perhaps after all this contingency of a bill or note being payable after the happening of an event certain, or morally so, is the only one which is admissible

2d Ray 1396 — in any such instrument — No certain form of a bill or promissory Note is required — Nor is it essential that

2d Ray 1556. — they be expressed to be for value recd — & It seems now settled that a Bill drawn to one without adding to order or bearer, is not negotiable, tho the point was formerly doubted

Of Bills of Exchange &c

When the Drawee accepts a bill he becomes immediate-ly liable for the amount of it to the holder, who may sue not only such accepter in the case of non payt- but also any one whose name is to the bill, as the drawer, or any indorsor or all of them at once if he pleases: & if he sue one & fail of getting his money he may sue any other who was liable to him altho' the first one sued has been taken in Execution. for actual payt. of the money by some one is the only satisfaction — And any indorsor who is sued by the holder may bring his action against the drawer, the acceptor or any indorsor prior to him-self, but not against subsequent indorsors — It was former-
3d Burr. 1672 ly contended that a verbal acceptance only, was with-in the Stat. of frauds but it is now settled that it is not — A bill is ordinarily to be presented before the time specified in it is out, but yet if afterwards accepted
Sal. 127 such acceptance is binding — If the Drawee will not accept the bill, any other may for the honor of the Drawer accept the bill, to prevent his Credit its being injured by the refusal; & such acceptance
Espe. N.P. Rep. 113 will be as effectual to bind the Drawer (or any indor-sor, says Lord Kenyon) as the acceptance of the drawee would have been, & that too without the least pri-vity between such acceptor & the drawer — these acce-ptances being usually after protest for the non acceptance of the drawee, are commonly termed acceptances supra protest — An agreement to accept a bill when drawn, if credit be given in consequence of such agreet., will be considered as an acceptance & bind the party as acceptor even tho' he countermand the agret. before the bill

3d Burr. 1663. drawn provided the credit be actually given before the counter mand, but not otherwise, for then such former agreet. is abrogated -

2d Wils 9 - Stra. 684 Bills are often accepted in a manner different from their tenor, as for part of the sum, or conditionally uppon the happening of some event or contingency & such acceptances are good pro tanto, or upon the hap-pening of the contingency; the holder however, may do as he pleases about resting satisfied with such partial or conditional acceptance, for he has a right to have the bill protested for non acceptance, if the acceptance be not absolute & for the whole sum - A very small matter amounts to an acceptance by parol, & allmost any thing written by the Drawee upon the bill if it does not negative the idea, will be construed into an acceptance —

If a bill be in this form pay to A. or bearer, no indorsment is necessary to the negotiation of the Bill, but barely a transfer from hand to hand - But if the bill be in the usual form of pay to the payee or order, there must be an indorsment by the payee either entire or in blank; & if it be in the latter form, the bill may then pass from hand to hand without further indorsment, any holder having the right to fill up such blank indorsment with an order to himself - But when an indorsment is once filled with an order to a particular indorsee, he must put his name on the bill inorder to continue

Doug. 611 - its negotiable currency - According to the Law Merch none can be sued upon a bill but such whose names appear upon it. so that such as have passed it by delivery merely without indorsment cannot be sued upon the bill ac-cording to the Custom of Merchants; but yet any one

who is the holder of a bill by such delivery, may, if his remedy fail on the bill, have an action at com. law against the person from whom he immediately recd. it, to recover the consideration which he paid for it — but can go no further back than to the person from whom he received it, as he may in case of indorsement

A blank indorsement may be filled up at the bar of the Court even after action brought — A bill may be negotia-

Ld. Ray. 575 ted after due as well as before — When one indorses his name upon a blank note, he gives credit to the mak-er of the Note to any amount, for the maker may fill the Note with what sum he pleases, & the holder may fill the indorsement with as strong a warranty

Doug. 496 as he chooses — The name on the back enables the holder to fill the blank with any thing incident or re-lating to the writing as an order, a power of Atty. a

Salk. 128 warranty or a discharge; the same is the case of a bill of exchange — & if the holder should present a bill for ac-ceptance with his indorsor's blank indorsement, & the drawee should pocket it, such previous holder might bring trover & improve the presenter as a witness, having a right to insist that the indorsement was designed to be filled with a power of Atty to the person who presented it, to rece-

3. Ray 871 — ve the money for the Pltffs use —

If one set his hand to a blank piece of paper & deliver it to another he may draw a bill over the name & it

1 Blac. 313 — will be good provided the proof be that he signed his name for that purpose to the paper —

Burrow 22-1216. 1st Blac. 295 If the holder of a bill indorse it to one without adding "or to his order" still its negotiability is not stopped by such form of indorsement; but if the words used are such as are evidential of the design of the indorsor

2.d Bur. 1227 to stop the negotiability of the bill, & restricting
Doug. 615. to that particular indorsee, it will have that effect
An Infant's indorsement so far as it goes to charge him is of no validity, but yet it is good to pass the bill, & the others whose names are on it are liable to all the incidents common to other bills—

When a bill is given to two merchants in Company the indorsement of one by the partnership firm is the indorsement of both; but if the bill be given to two who are not partners, the
Doug. 630- indorsement of one does not bind the other—
If a feme sole holder of a bill marry, her husband
Stra. alone can indorse the bill— An Ex.r may indorse
1260- a bill & such indorsement binds him personally
Cau. 466 Part of a bill only, can not be indorsed——

The contract of the drawer of a bill is supposed to extend not only to the payee, but with all those also, into whose hands it ~~may~~ comes by indorsement, & such contract is construed to be 1.st that such drawer is to be found, i.e. that he is where the bill describes him to be; 2.d that the Drawee is capable of binding himself by an acceptance— 3.dly that he will accept the bill & 4.thly that he will pay it & upon the failure of the Drawee in any of these particulars the Drawer becomes liable to the payee or indorsees for the cont.t of the bill, or as the case may be, for the damages & costs also— Upon the happening of any of the foregoing contingencies the Drawer is immediately liable, even tho' the
Doug. time of pay.t be not out, as if the bill be presented for
- 55. acceptance before payable & dishonoured—

By the indorsement the Indorsor is to the indorsee

as a Drawer, & the indorsment makes it like a new bill — so that the indorsor becomes responsible to all subsequent holders, in the same manner that the Drawer by drawing the bill is to the payee & all subsequent holders — the holder may on default of paym.t sue any or all those whose names are on the bill previously to his own, & after pursuing one to execution & imprisoning him, & even releasing him, still may he sue any other, if he has not got his money, who were parties to
2d Blac. the bill, for a compensation in fact is the only thing
Rep. 1235 — which seems to work an extinguishment of the claim

The holder of a bill in order to charge the drawer or indorsor, must present the bill before the time of paym.t is out, (but when pay.ble at sight no time is limited when it is out) & if the bill be refused, ~~he~~ he must give notice to the Drawer or indorsor if he choose to make him liable; ~~&~~ if he would have his election out of all or a chance to sue all who can in law be made liable, he must notify all whose names are on the bill previously to his own, or at least must use due diligence to notify them; for he can sue, none ~~but~~ such as he has notified, except it be the Drawer & that too in a case where the drawer had no effects in the Drawee's hands — If the holder notifies
5 Burr. fy only an indorsor & sue him; such indorsor must
670 — notify the drawer & prior indorsors, if he would
1st Ter. Rep.
712 — entitle himself to an action against them —

It is not however, as is above remarked, necessary to notify
Ter. Rep. the Drawer in case ~~the~~ ~~Drawee~~ he has no
410. effects in the hands of the Drawee —

This practice is usual but quere as to its necessity See Swift Chitty &c. — Tho' a bill be presented for acceptance & refused before it is payable, still when payable, must be presented again, & if again refused the same notice of non payt. must be given as was before given of non acceptance — it is also incumbent upon the holder to give similar notice of the absconding of the Drawee or his becoming bankrupt — It is not enough that the Drawer knows of himself that the bill has been dishonored; but particular notice in the prescribed form must be given by the holder, this however holds only in case of an accep-

1st Ter. Rep. 170. — tance & non payt. — This notice must be given within a reasonable time, that is, in the case of a foreign bill, by the next Post; in that of an inland Bill, it will depend upon the circumstances of the case —

Formerly there was a great difference between foreign & inland bills of exchange, as it respected the formalities in case of their being dishonored; no particular mode of notice being required in the case of inland bills, & the only design or effect of notice being to lay the foundation of a recovery of the contents of the bill, whereas in case of the protest of a foreign bill damages ~~as well and cost~~ are recoverable as well as the contents of the bill: but ~~by~~ the Stat. of Ann has put inland upon the same footing with foreign bills as to the recovery of damages if the same mode of protest be followed: it is however absolutely requisite by that Stat. that the accepta-

be in writing if the bill be for more than 5£ – This Stat. however is not imperative, that the mode of Protest shall be followed, but only entitles to the advantages held out by pursuing that mode, & leaves the holder if he chooses to the old com. law mode of notice, which entitles only to the contents of the bill – In this State we have no similar Stat. to that of ~~Conn~~, of course our inland bills remain as at com. law – Our Orders differ from inland bills only in this ~~that~~, that after acceptance, if pay.t is not made, the holder must pursue the acceptor for his money before he can return upon the Drawer unless the acceptor be a bankrupt. Notice upon a foreign bill must be by protest, & that whether for non acceptance or non payment, & no other information will be sufficient to lay a foundation to come back upon the drawer or indorsor; This protest must be made by a Notary public, but if there be none in the place, then by two or three substantial Inhabitants of the vicinity – The Notary must present the bill in person to the Drawee, & upon his refusal must note the date, & then draw up a protest, & also note the design of the holder to come upon those who are liable, & send the information off by the next post, & when the time of pay.t comes, he must again present the bill & go through with the same formalities, & with such last notice send the bill; & the doings of the Notary are sufficient to found an action upon

Lex. Mer. 460 without the Original bill – So when the Drawee cannot be found a protest is necessary, or when accep.d in part only

it must be protested for the rest, to lay a foundation for the recovery of the residue — A bill in certain circumstances may be protested for better security. as if the Drawee abscond before the day of paymt in which case the holder may immediately protest for better security, as it is called; he must however nevertheless present ~~& protest~~ it again on the day
2d Cay 753 of paymt & have it protested for non payment —
No certain rule of damages can be laid down it being varient in different places; but in this Country the rule seems to have been 20 pr Ct
Lex Mer exclusive of the Cost which is said to be, the actual
461 expence of the holder in the business — When a judgt is obtained on a bill of Exchange or any other obligation in writing carrying interest, interest is allowed to the time of final judgt; but if there be security for the interest aside from the principal obligation in suit, no interest is allowable
2d Bur 1085 upon the note in suit —

When the Drawer of a Bill by the terms of it desires the Drawee to accept it upon the acct of some 3d person if the Drawee refuse he may still accept it for the honor of the Drawer; or if a bill be in common form, if the Drawee does not choose to accept it on acct of the Drawer, he may still do it for the honor of ~~the~~ an indorsor: or if the Drawee totally refuse; any 3d person may accept it for the honor of the Drawer or any indorsor, in all which cases the bill must be first protested for want of acceptance according to its tenor, & all such acceptances are for that reason denominated acceptances supra protest —

& in case of the acceptance of a 3d person for the honor of the Drawer or acceptor, if such person for whose honor it is accepted does not notify such acceptor of his approbation of such acceptance, the acceptor must on the Day of payt. present the bill again to the origl. Drawee & have it protested for nonpayt. in order to charge such drawer or indorsor for whose honor the acceptance was made — When one so accepts for the honor of the Drawer he is liable upon the acceptance as in case of a usual acceptance, but has his remedy only against the Drawer for whose honor he accepted it; but if the acceptance be for the honor of an indorsor, he is liable only to him & the subsequent indorsees, but has his remedy over against the
Lex. Mer. Drawer & all prior indorsors as well as against the
457. particular one for whose honor he accepted it.

When the Drawee accepts a bill & neglects to pay he is liable to the holder & all the indorsees as fast as they are sued, & so also he is to the Drawer if the
1 Wils. drawer had effects in his hands, which is generally
185 the case. but when not indebted to the drawer the drawer can have no action against him, but this circumstance makes no difference with the other parties to the bill as holder & indorsees.

Nothing short of an express declaration of the holder to that effect will discharge the acceptor so as to prevent such holder recovering of him, nor any delay as between them will preclude his right of recovery short of the Stat. of limitations — And even such express discharge by the holder, will not preclude the
1 Ld. Ray. right of others interested in the acceptance, to recover of
742. 2 Stra. such acceptor — If the holder accept part of the money of
745 Bul. N.P. the acceptor, he cannot call on the Drawer or indorsors for the
271. residue, unless he duly protest the bill at the time of payt. for the residue —

Of Bills of Exchange &c

It has been questioned whether the common law remedies of Debt & Ind. Ass. may be substituted in the room of actions on the bill according to the custom of Merchants; & it seems that when there is no privity between the parties which happens frequently in case when actions according to the custom will lie, there the com. law remedies can not be applied, but where there was a privity they may be used — The more modern declarations upon bills do not set out the custom at large as the ancient ones used to, but after alledging the draft, delivery, demand &c. comprehending all necessary facts, declare ~~that the~~ Deft. has become liable according to the custom of Merchants — When the indorsee sues he must state the indorsement; if there be a number of indorsements he may strike out all but the first if he chooses & declare as indorsee to such first indorser, provided the indorsement be in blank, for every subsequent indorsee is in fact the indorsee of the first, but in case of a string of special indorsements the chain must be set out to shew the right of the Plaintiff — When the suit is against the drawer or indorser the manner of notice viz. by protest, must be stated, & if omitted the declaration would be bad even after verdict.
Doug. 684

The drawee after accepting & paying the bill, if he have no effects of the drawer in his hands may have an action against him either on the bill according to the Custom of Merchants, or an action of Ass. for money paid laid out & expended.

Of Bills of Exchange &c —

When all the facts of a transaction are stated
1 Ld Ray. 538 — & the promise only omitted in the declaration
Sal. 128 in action of implied asst. it has been holden suf-
Car. 209. -ficient — In case of a bill being negotiated after
a blank indorsement, without the negotiators of it
entering their names upon the bill as indorsors.
those whose names are not on the bill can not
be sued upon it, nor in any other way, except
each person by the one to whom he immediately
transferred it, & that too in an action as at com. Law
When the holder sues several at the same time
as the acceptor, drawer & indorsors, the mode of
conducting the business is this; as soon as the
money sued for is paid by one in Court & the
Cost of all the suits, the Court will stay further
proceedings: Or if the Pltff get Exns against all &
2d Blac. 749 — collect the Debt out of one & to the amount of
2d Vez 115. the Cost of the ~~several~~ suits, out of each of the
Strange 515 others, an Audita querela will be granted to pre-
-vent further collection — In actions by the in-
-dorsee against the acceptor, the hand of the drawer
need not be proved, but that of the first indorsor
must — But in action by the payee against the accep-
-tor the drawer's hand must be proved — When the
drawee promises to accept before he sees the bill, the
1 Ld Ray 444 hand of the drawer must be proved in any action ag-
Str. 946 -ainst such acceptor — In an action by the indorsee
he must prove the hand of ~~the drawer~~ his indorsor,
& if it be against the drawer he must prove his hand
too, & in this & all other actions, by way of resorting
back, presentment & refusal must be proved — In an
action against the indorsor, by his indorsee, such indorsor's hand only need be proved

Of Bills of Exchange

In an action by the drawer against the acceptor he must prove presentment, refusal, protest & his own damages in being called on & paying the money — If the action be by the acceptor against the drawer he must prove that he was not indebt-ed to the drawer, that he accepted & paid the bill & also the hand of the drawer — By the custom of Eng. the bill if within the realm, as well as the Notaries doings is required in proof upon the trial this is an inovation upon the gen^l. law Merchant an acceptor after having accepted the bill cannot set up forgery in defence having given credit to the bill but one who is charged as drawer or indorsor of a bill may alledge forgery in defence, but cannot in proof introduce his own writing to shew the dissimi-

2^d Str. 1051 — larity of hands — & this is a common law principle if an obligation be given for an illegal consideration that Obligation at com. Law is void altho in the hands of a bona fide holder, but by the law Merchant a security whether note or bill after it is nego-tiated, & in the hands of a bona fide holder is not avoidable, except it be a usurious instrument, or be given for money lost at play —

It is laid down in one case that where two or more

3^d Ter Rep. 418 — are engaged in an unlawful pursuit which is malum ~~in se~~ prohibitum merely, & not malum in se, & one of the parties at the express request of the other & on his promise to repay advance money, such promisee is allowed to recover of the promisor upon such promise the illegality of the

— priml consideration notwithstanding —

Of Policies of Insurance

The business of insurance is usually transacted in Offices on purpose for that business - but it may be, & not unfrequently is, done by others; a policy being drawn up may be subscribed by any one who is disposed to underwrite at the proposed premium, for such amount as he chooses to annex to his subscription - Policies of Insurance tho' principally, are not entirely confined to commercial transactions, neither are all cases governed by the same rules & laws - Insurance on lives which generally speaking are merely a species of gaming, are forbidden by the Stat. of George 3d, unless the insured has an interest in the life insured - This Stat. is of no force in this State & whether such policies would be supported when there is no interest in the life to the insured, has not been decided - Insurance against fire are common, & as it is not a mercantile matter, so it is not altogether governed by the principles of mercantile law - Without Stat. intervention in insurances of this kind, it has always been ~~consid~~ held requisite for the insured to have an interest in the propy insured, & that too, when the accident happened, for the moment the insured disposes of his inter-
2 Atk. -est in the house or other like propy insured, the policy ceases,
554. not being an interest transferrable with the building -
In insurances against fire, is among other things usually
2 Wils excepted, burning by usurped power; this however does
363 not mean any riotous mob - Forts, arsenals & other pub-
2 Burr. lic propy are not insurable - When a Ship is insured
1905 at & from any port, it has been questioned whether the underwriters were liable for the loss of the Ship in the port & before taking in the cargo, but it has been decided they were unless the voiage had been laid aside

Of Policies of Insurance -

If the Ship & freight be insured in the manner last mentioned, & the Ship be lost in port, the insurers
Stra. 1251 - are liable for the ship only - It has been in one case decided that parol proof might be admitted to
Sal. vary the meaning of a Policy, but standing alone
444 - its authority may well be questioned -

By Stat. in Eng., all wagering Policies are void, in this State we have no such Stat., nor has any decision been had upon the point - There may be some interest in a ship insured, but if it be only such an interest as a lender upon respondentia, or bottomry bonds has in the fate of the
3 Bur. Ship, it gives such lender a right to insure, but
1394 the Policy must specify the nature of such inter.

When a ship is lost at sea whether totally or not the owners have right to abandon & come upon the insurers as for a total loss, leaving the salvage if any to the insurers - When the salvage is less than the freight it is always considered as a total loss - In no case is the insured obliged to abandon, but may sue the underwriters for a partial loss, or average, even when the loss is in fact total & no average exists - When a ship is captured & recaptured before the owner knows of it so as to make his election either to abandon or not, while in the enemies hands: he may after the arrival in port abandon provided the damage & hinderance be so great
2 Bur. that the salvage will not be better than the freight,
683
1198 - but if the loss be less than is here mentioned, he must claim an average only - But if the owner hear of the capture of his Ship before her recapture & return into port he may abandon tho' she be afterwards saved without material injury -

Of Policies of Insurance — —

Sha. 1183 Bur. 1361 — Any the least fraud whether it be by suggestion of a falshood or suppression of the truth vitiates a Policy; but the mere speculative opinion of the insured at the time of effecting the policy need not
3 Bur. 1905 be communicated — When a Policy is avoided the premium must be returned — When the Ship is lost by the negligence or mismanagement of the insured or any one whom he may employ the underwriter is discharged — A deviation, unless it be compulsory is a discharge of the underwriters, & yet a mere design to deviate, if the vessel be lost before she arrived at the deviating point will not discharge
Sha. 1249 the underwriter — Theft is always one of the accidents mentioned in the policy, but it is construed to mean a public robery, & not a private larceny — When a Ship & cargo are insured without valuation by a number of underwriters, each one is liable & that for the whole amount of his subscription — But when the Ship & cargo are valued, & underwriters are procured to greater amount than the worth of the property insured, the latter underwriters are discharged after the full value is insured, upon delivering up the premiums rec — When the insurance is made after the sailing of the vessel it is always lost or not lost, so that whether the loss happen before or after the insurance the case is the same Double insurances are unlawful & so the latter policy void unless in case of the insolvency of the first insurers, or in case of a second insurance by an authorized agent who was ignorant of the insurance effected by his principal — In such case the insured
Bur. 482 can recover only one satisfaction, but whether this must all be got from one, or whether a proportion from each seems doubtful

Of Policies of Insurance

The insured must strictly observe the terms of
the policy - if to depart with Convoy, it means
Sal. 443 to performe the voiage with convoy, & the ship
must not straggle from the convoy without neci
-ty - When a Ship is to depart with convoy, sailing
Ibid. to the place where the convoy is, so as to join them
is departing with convoy - If the policy con
-tain a stipulation to this purport, "till the Ship is
discharged from her voiage" - if after the arrival
of the Ship the owner takes out the cargo in his
own lighters & they be lost in landing the under
-writer is discharged, aliter if they are put on boa
Stra. 1236 of the Ship's boats & lost - Insurance against the
Barratry of the Master, is an insurance against
his fraud of any kind, as embezzelment, deviation
without orders &c - but if the owner have any know
-edge of the Masters conduct so as to countenance it
the insurer is discharged - No manner of negligence
will amount to barratry in the Master - Insur
-ances against embargos, does not amount to
seizures for illicit trade - When no risque
is run, as if the voiage is laid aside, the premium
must be restored - but if the risque be once begun
by breaking ground upon the voiage, as it is ter
-med, the premium will not be returned, tho' the
voiage be abandoned - If there be two contracts
seperate, as if a Ship be insured from London to
Cork, & from thence with convoy to Newfoundland
& the convoy fails, the insurers are discharged
of the risque from Cork to Newfoundland, & must
return the premium, but the Policy remains good
for the former part of the voiage - But if the con
-tract be all one, & the Policy be to go from place to
place through ever so many places, there is no apportionment

of the premium — & if at the time of insurance the insurer knows any favourable circumstance, as that the Ship is near the port or the like, is not bound to disclose it to the person applying for the insurance; but if he knows of her being actually in Port & past all danger & suppresses the fact it is a fraud, & he will be compelled to return the premium — When a vessel is not heard from in a long time her total loss will be presumed but what length of time is sufficient to raise this presumption is dependant upon the particular circumstances of each case —

Of Charter party —

A Charter party is when a vessel is chartered for particular services — And it is a principle of the Mercantile law that if the Ship perish no freight is allowed But if the vessel be chartered at so much for the outward & so much for the homeward bound voyage, if she perish on the return, the freight for the outward bound voyage will be allowed, for it is a rule that freight is due when the vessel arrives at the port of lading or deliv^y & the master has a lien on the ~~vessel~~ cargo for his freight — the freight is so much p^r ton & that whether loaded or not provided the want of loading is the fault of the party chartering the vessel — If the cargo be damaged the owner may abandon it to the owner of the vessel & recover for the whole — If the vessel be disabled or taken, apportionment of the freight is made according to the circumstances of the case — By the marine law if the Master be in distress for necessaries he may hypothecate the Ship to procure them & the person to whom it is hypothecated is the absolute owner till she is redeemed; the lender has also the security of the owner & Master — the owner of a Ship is liable for the conduct of the Master & the Master may be liable over to the owner if through his misconduct damage arises — The ~~owner~~ Master has always authority to refit the Ship at the owners expense —

61- Of Merchant & Factor

When a factor's commission enables him to do with the goods committed to him as with his own he may sell them upon credit, & if any loss arise from this mode of dealing it falls upon the princip. But if the commission be to sell & dispose of them as is the usual tenor of such authorities, they have no power to trust them out, but must account with the owner for the full value of them tho' lost. The proper legal remedy of the owner against his factor is by action of account; but this action has in Eng. for a long time given way allmost wholly to applications in Chancery - In this State applications in Chan. are rarely if ever resorted to - but actions of Acct. & of Ass. when ~~they can~~ from the nature of the transaction, this latter mode can be pursued, are in use - Factors have a lien upon the goods in their hands for their commissions & also for a balance due them in account with their principals - & this lien is good against Creditors as well as the owners.

8 If a factor in his principal's service under-takes to run goods, & they be siezed, the owner is entitled to an action against him for the loss. But on the other hand if the factor be successful & evade the duty & yet charge the owner as for the duties paid, a Court will presume such duties were paid & not admit evidence to the contrary, unless the factor be a home factor & has defrauded the King's revenue, for in that case for the purpose of protecting the revenue such proof will be allowed - The Owner is liable civil-ly for the frauds of the factor - If a factor sell goods

Of Merchant & Factor &c

& vests the money arising from the sale in other goods & dies it has been settled that the principal has a right to the goods & not the creditors of the factor; but if the money be in his hands at the time of his death not revested in other goods, it seems that it is liable for the factor's debts — When a factor sells upon credit whether with, or without permission, the debt is due to the owner from the vendee, yet a paym.t to the factor is good untill the owner prohibit it — If the factor pledge the goods confessedly for his own debt it is no incumbrance to
Stra. 1188. the prop.y of the owner in them — but if the factor sell as factor, upon credit, but without liberty to give credit, still the prop.y vests in the vendee & the owner can not take it from him — When the factor takes the risque of the debts upon himself it has been a litigated point whether the owner can maintain an
Ibid 1182. action against the vendee for the price, & it seems a point not perfectly settled —

Miscellanious — remarks —

If the mariners embezzle the prop.y the Master & owners of the Ship are liable — If the Ship be lost by the negligence of the seamen, they lose their wages; & indeed be lost at sea by any means, or be captured by pirates the mariners lose their wages — Sailors have the privilege of libelling in the Admiralty Courts for their wages wherever the contract might
Vent. 146 be made — a whole crew may join in a suit — & they have a remedy both against the master & owners — When any part of the cargo is thrown over board for the safety of the rest, all who have any interest, even to the wages of the seamen, must contribute a share to the loss —

Miscellanious remarks &c –

And if the property of any one be only injured in degree in the preservation of the rest, the common proportional average takes place – the same is the case in the event of a ransome – But when injury to any ones propy happen by accident merely, or if it be taken away by pirates, no average takes place – When the Ship is taken the ~~Ship~~ Master must be ransomed by the owners, & the master may not only apply any, or all their propy to that purpose, which is in his hands, but may also pledge himself for the payt. of the money, & the owners must redeeme him – Merchants have a privi-lege peculiar to themselves of stopping their goods in transitu, after sale, when the vendee is discovered to be a bankrupt – but this right must be exercised while they are in transitu only, for if they once arrive at the place of destination they cannot be reclaimed; neither can they after bills of lading are consigned whether to the purchaser, or to 3d. persons for his use, for by consigning the bills of lading the property is vested in the consignee – It is very doubtfull whether this right extends to retail merchants dealing with each other; & when the goods are purchased for ye private consumption of the pur-chaser it never is the case – –

Moore 277 –

2d. Ter. Rep. 63.

Of Joint Owners of Vessels –

When there are many owners of a vessel & the major part of them, or rather of the property in her, desire to have her sail, & the rest refuse, such majority may by applying to the admiral-ty & giving security for the safety of the rest of the vessel may have an order to send her to sea, & if it be prosperous they reap the whole advantage of the voyage

Of Joint owners of vessels—

But if no such steps be taken, but the majority of the interest send her to sea, & she make a good voiage the minority will be entitled to their full share of the benefit; but if she be lost the minority are without remedy— If it be the majority who refuse to send her to sea the minority may by proper application to the admiralty have her sold & the avails distributed— The Master of a vessel who is hired to carry goods is, if he be above low water mark i.e. in the body of the County, under the jurisdiction of the common law Courts, & as a common carrier liable for any loss, except resulting from the act of God or the open enemies of the Country; but if below low water mark he is within the admi-ralty jurisdiction, & not liable for any loss which was not incurred through means of his negligence—

Vent 238 2 Ray 98— or mismanagement, as being robbed by pirates or the like— Factors when they use due diligence in their station, are not liable as bailees at all events, are for every loss—

2 Ray 918— but when they are faithful if any loss happen the Master must bear it—

Imprisonment without bail says our Stat. is allow-able only in capital offences & for contempt in open Court, or in such cases where in some positive Law prohibits bail; which must mean some Statute law, other wise the Stat. would be nugatory

Our Stat. respecting pleas in abatement is un-meaning, it not altering the Com. law upon that subject, for tho' it says all errors may be amend-ed on pay.t of cost, it must be understood of amend-able errors only, for there are many errors which in their nature not amendable, as if 12 days notice of the writ be not given &c — The rule is that when the error is such as can be amended in such man-ner as to make the writ correspond with the exist-ence of facts & the positive requirements of Law, it may on the pay.t of costs up to that time, be amended, other wise not — And tho' the Deft. should finally be be cast in the action he pays no cost arising antece-dent to the amendment, except the writ duty & serving.

After a writ is abated for one error & amended, it may be abated upon another if any exist; but yet when the Pltff has paid cost & has liberty to amend, he may amend all the errors which are in the writ whether pointed out by the Defts plea or not — When the Deft. appe-als upon a plea in abatement, & the higher Court over rules his plea, but finally on the merits gives judg.t in his favor, still he must pay cost up to the termination of the Plea in abatement, & an Exn. may be issued against him therefor — N.B. there is no such amendment after

Of Connecticut Statutes —

It has been determined by the Sup^r. Court that a writ shall be considered as pending in Court from the time of service — When a suit is pending against several, if one die the action survives against the rest —
In our Stat. for the prevention of perpetuities, there is a clause which empowers the owner of an estate to pass it either by deed or Will, not only to such persons as are at the time in esse, but also to the issue of any person in esse, by which means the free hold may be in abeyance, which the Eng. Law disallows except in case of an Executory devise, which is much upon the same footing upon which our Stat. puts both Deeds & wills — Our Stat. breaks up entailments after the first holders, vesting the fee simple in the 2^d. donee in tail — In our Stat. regulating civil process there is a provision for attaching property which is an inovation upon the common law, & known only in New England — If the Debtor will turn out sufficient personal propty his body can not be taken by attachm^t. & after his body is arrested for defect of propty, if the Debtor will shew sufficient propty his body must be released, provided he do it before actual imprisonment — And on the other hand if the Offic^r. levies upon the body (no propty being turned out by the Deft.) when he might have taken propty enough which was unquestionably the Defts, altho' such Deft. can not complain, yet the Pltff may, if by means of such imprudence of the Offic^r. he lose his debt or any part of it, & the Offic^r would be liable to him for such loss so occasioned — But the Offic^r is in such case to be treated tenderly, & is not oblig^d. to risque levying on propty which is in any way doubtful, but he must be liable if he refuse unquestionable propty either before or after the arrest —

Of Connecticut Statutes —

Such articles of propy. as are privileged from Ex.n can
- not be taken by attacht. unless voluntarily turn'd
out in which case it must be taken in discharge of the body
Turning out land will not secure the body either
against attacht. or Ex.n — unless the Cred.r choose to take
The Cred.r is not obliged to levy his Ex.n upon the
same propy. attached — When an attacht. is levied on
propy. it cannot be levied on the body also unless
the security fail by the perishing of the propy. attached
When an attacht. is served merely as a summons
it is not an abateable defect; but yet the Cred.r
to secure his demand may sue out a 2d. attacht.
& take propy. & this last writ will not abate on
the ground of there being a prior suit for the
same thing, the first being in such case considered as
a nullity if the Cred.r so elect to treat it — By our Stat.
when land is attacht. a Copy must be left at the
town Clerk's office; this however is for the purpose of
notice to 3. persons, & the omission of it is not a defect
of which the Def.t can take advantage in abatement
All actions relating to the title of lands must be brought
in the County where the land lies; in other actions the
Pltff has his election to prosecute his suit either in the
County where he lives, or that in which the Def.t dwells,
The action of Debt on judg.t is necessarily resorted to when
the Deft. lives out of the State so that Ex.n from the Court can
not reach him — or if a justice of Peace, die, remove or be
left out of office after having rendered a judg.t which remains
unsatisfied; & indeed in any case it may be resorted to when
it will put the Pltff in a better situation than an Ex.n upon
the first judg.t would — After a year & a day the Circuit Court have
-ed of this action because interest is in that Court allowed. but as our Courts
not allow Int. on judg.t such action is not sustainable for that cause

Of Connecticut Statutes —

In this State by Stat. our Courts of Law when they render judg.t upon a bond with penalty, chancer the ~~law~~ down the penalty: this too is done in Eng. & in the other States— But our Stat. & the practice under it extends further & in cases where the parties have agreed what the sum in damages shall be for any default in the performance of their written agreement, without calling it a penalty, our Courts will Chancer; & under the words in the Stat., which after pointing out the particular matters to which the power of the Court extends, go on to say "& the like," the Court undertake to enquire into the real damages in every case which is determined on demurrer to the Declaration or other parts of the pleadings, or when the party suffers a default to be heard in damages, judg.t in all such cases goes at first for the gross sum, but on motion the Court enter into the enquiry of the real damages— In Eng. & in the other States, all these matters except as to penalties, are referred to a jury of enquiry to assess the damages— Our Stat. mentioning in what case no more Costs than damages shall be given, mentions ~~[illegible]~~ Trespass on the Case, by which it seems a difference is understood between that, & actions on the Case generally, which difference is not recognized at Com. law— It here, seems to be confined to those kinds of vindictive actions which are brought for the recovery of damages sustained in consequence of some illegal act, & not to extend to all actions which are usually termed actions on the Case— N.B. It is a principle in Eng. law that all voluntary bonds & such as are given to kept mistresses (not previously in habits of lewdness) are good against the representatives but are postponed to all creditors even by simple Contract— In this St. in case of Insolvency it may be a question whether the holders of such bonds can be admitted to an average—

When a matter is to be submitted to arbitrement & the parties do not agree upon the men, each may choose one & the Court a third, & in this Case they are styled Referees — In cause of Execution the Offr. may not take the body if propty be turned out; but if the debtor will shew no propty the Offr. need not search for propty but may take the body, & will be holden excusable against both Creditor & debtor; the case being somewhat differnt from that of an attacht. as it respects the right of the Credr. to compel the Offr. to search for propty — The action of acct. which is almost disused in Eng. is genera[lly] avoided here — this action has some peculiarities about it. The parties are admissible witnesses, & not only so but are each compellable at the request of the other to testify — the judgt. if for the Deft. is final, if for the Pltff it is only that the Deft. acct., to adjust which, acct.s Auditors are appointed who may award the bal. whether in favor of Pltff or Deft. as the case may be; such award being reported to the Court if accepted by the Court is final — But on remonstrance the Court will set aside the award for misconduct in the auditors but will not go into the merits of the Case — the mere discovery of such new evidence as would induce the Court to grant a new trial, will not be sufficient to set aside a report of Auditors —
As to evidence before the Auditors, they ought not to admit any thing which was given in evidence before the Court upon the issue of no bailiff &c —

Prosecutions upon our Stat. respecting bastardy, is in its dress criminal, but in its effects civil. In this case as in criminal ones there is no appeal from the judg. of the County Court; neither need the woman give bonds of prosecution because of its being of a criminal nature, for in criminal prosecutions no bonds are required; & yet depons are admissible which are not in prosecutions properly criminal even the Depo. of the complainant when incapable through sickness of attending, has been admitted but her personal attendance is not dispensed with on account of distance or other cause than that of absolute inability to attend. When the person accused is brought before a just. of Peace he may bind over or release at discretion; but yet his releasing does not in this case seem to be definitive for the complainant may apply to another Just. or it is said, to the County Court directly. When the woman does not prosecute, the Selectmen are by Stat. authorized in behalf of the town to prosecute, but if the woman declines swearing the Child it seems doubtful whether the Court can compel her rightful-ly, to charge it upon anyone. When a Stat. directs that any person, or community shall do a particu-lar act but points out no way to enforce it the com. law will lend its aid, for when any thing is or-dained by Stat. the disobedience of such Stat. is an offence at Com. Law. When Parents neglect to give their Children that instruction which the law directs

the Select-Men are empowered by Stat. to take away their Children & put them out, in which case the masters of such Children are in loco parentis & liable for the misconduct of such children & at the same time all liability of the parent is taken away, for the misconduct of such children. Such kinds of Corporations as ~~are~~ have an indivisible interest, when no writ of partition will lie, the Corporation of Yale College, may have an action against any one of their members for a wrong done to property of the Corporation. But such associations as are a Corporation ~~for~~ for certain purposes, so as to sue a stranger, as a Corporation; but yet a writ of partition will lie, no action can be maintained by the Corporation against any one of its members for an injury done to such corporate property. Neither can any voluntary ~~[illegible]~~ association for any purpose whatever, if not aided by a Legislative act, sue a wrong doer, as a Corporation, but must sue in the name of all the individuals composing the association who own the prop.y which is the object of the suit — A County may sue by their Treasurer but can not be sued being not a Corporation for that purpose — Yet in the Case of the escape of an Execution prisoner through the insufficiency of the gaol, the County may be called on in the mode specially pointed out in the Stat but not otherwise —

Upon the Stat. respecting absent & absconding deb-
-tors, it has been decided, that one who shuts himself
up is an absconding Debtor; an absent Debtor is one
who always resided out of the State— Upon the Scire
-facias, the garnishee is an admissible witness— for-
-merly it was a doubt how long the propy was holden
in the hands of the Garnishee after judg.t against
the orig.l debtor, but now the time is fixed by Stat.
so that the demand must be made of the Garnishee
within 60 days after the judg.t, & the Scire facias must
be brought within one year after the right of bring-
-ing the same hath accrued— the Garnishee may
be factorized before the debt due from him to the
principal is payable, but the Sci. fa. can not issue
untill the pay.t becomes due— If the Debt of
the Garnishee is payable in any articles of
propy instead of Cash, he need do no more than
turn out such propy on the Ex.n when demand
is made, which Cred.r must take or be entitled to
nothing from such garnishee; & in such case it
seems that the cred.r may do as he pleases about levy-
-ing his Ex.n upon such propy; which if he do, he
must sell at the post & may pay himself out of
the avails as in other cases of a levy upon the debt.rs propy
When there are many who are agents & factors the
the Cred.r may factorize them all if he will; but
his Sci. fa. must go seperately unless they be joint debtors
& yet it is said those against whom no Sci. fa. issues,
may plead the judg.t on the factorizing suit in bar to
a suit by the orig. Cred.r vs them, altho the money be all
collected out of others, & drive the Cred.r in to Chan.y— sed de hoc quere—

After judgᵗ against the principal if the Garni-
-shee refuse to pay on the Exⁿ & a sci-fa. be brou-
-ght & effects of the Debᵗʳ be found in his hands
he will be subjected to pay the Cost upon the
Sci-fa. & cannot charge it over to his principal
because he ought to have pᵈ. upon the Exⁿ &
saved the Cost — Whether a judgᵗ Debt can be
arrested by this mode of process seems doubt
-full, tho thus far it has been decided that
when an Execution is issued & the Offʳ. is pres-
-ing the Debtor who is the Garnishee, he is just-
-fiable in paying over the money to the Offʳ. this
being a compulsory payᵗ by due course of law.
But whether the Garnishee when not compelled
paying over the money voluntarily to the
Offʳ. after Copy left, would be justified, has
not been decided — & whether the Offʳ. who receives
payᵗ. as above knowing of the factorizing, ought
not to hold the money in trust for such attach-
-ing Credʳ. has been a subject of speculation
but there has been no decision — It is said that
our Courts consider the judgᵗ upon these factorizing
suits of no validity except to get the propʸ out of
the hands of the Garnishee; & that Debt will not
lie on such a judgᵗ. nor even an Exⁿ. be collected
of the origˡ debtor, but that a new action may
be brought for that purpose on the origˡ contract
but this would be a monstrous distortion of
the Statute & cannot be law —

In a trial upon Sci. fa against the garnishee brought in the County Court an appeal lies. The genl. rule respecting appeals from a judgt. upon sci. fa. is, when the Sci. fa. is against the same person or his Representatives against whom the first judgt. was obtained, there is no appeal, but when against another person there lies an appeal as in other cases —

When the debt due to the absconder was by note & that Note be assigned, the assignment is protected, altho: our Notes are not legally assignable — so that the obligor must pay the money to such assignee (the assignment being previous to the service of the factorizing suit) & not to the factorizing creditor —

Of Slander it is observable generally without reference to the Stat., that among other actionable words, which are those which charge one with conduct subject a man as for a trespass only, provided that such misconduct or trespass be in its nature infa-mous — but if not, such charge is not actionable — malice either express or implied must appear in order to support this action; tho' malice will be pre-sumed unless the contrary appear; it is however not always necessary in an action for consequential damages to prove malice, for if the Plff has suffer-ed by the inadvertency of the Deft. he, the Deft. ought to answer for it — An action for consequential damages must always point out the special loss, but an action

for words in themselves actionable, no special damages may be proved unless specified in the declaration — We have a Stat. relative to Slander which so far innovates upon the com. law as to make Slander a fineable offence, but that only by way of a qui tam prosecution upon the Stat. by the person injured, for no other, not even inform-ing officers can prosecute upon the Stat.; & there has never been an action upon the Stat. as yet by the person injured; & perhaps never will be; an ac-tion at com. law would be a bar to one on the Stat. & vice versa — When a person is prosecuted by a Grandjur-or for a crime of which a justice of peace has no cog-nizance further than to bind over, he ought to bind over without going into any enquiry concerning the probable guilt of the person prosecuted, but the practice is otherwise; an enquiry however is so far necessary as to discover whether the just. have or have not jurisdiction of the offence. In all cases except swearing, sabbath breaking & drunkeness, an appeal lies from the decision of a justice convicting any one, to the next C. Court but from the judg.t of the County Court in crimi-nal cases no appeal lies, tho a writ of Error does. At common Law the accused when acquitted nei-ther receives nor pays cost: but by our Stat. in some cases the Court have authority to subject the accused to Cost altho' found not guilty —

Of Connecticut Statutes –

It has been recently determined by the Court of Errors that the term fraudulent contract in our Stat. relative to divorces means bodily imbecility – Seven years absence unheard of has been deemed a sufficient dissolution of a marriage without a sentence of divorce – Upon these words in our Stat. relative to dower, "shall be endowed of one third ~~part~~ of the real prop. "of which the husb. at his death stood possessed," a doubt has arisen whether the word "possessed," here can be considered as synonymous with seized, but it is the better opinion that it ought to be, in this place, so considered, for altho' the land may be leased out & so not in immediate possession, yet to most purposes the possession of the lessee is the possession of the lessor, & therefore in this case – By our Stat. a fifteen years adversary possession of lands vests the possessor with such a right as that he cannot be dispossessed of it by any action, except in the cases excepted by the Stat. – It has been a question whether this limitation extends to cases of public highways, & the better opinion seems to be that it does not, provided such highways can be considered as strictly belonging to the public in general – Writs of Error are 'ained upon the record for errors there appearing; i.e. either originally upon the record or introduced there by bill of exceptions – Errors in fact some times arise extraniously, as from the ignorance of ~~the~~ an existing fact, as if the judg.t be rendered against a minor – & the regular mode in Eng. is to bring writs of Error in fact before the same Court who committed the error; but this has not been the practice in this State –

Of Real Estate and the Conveyance of it

Our fee simple differs in nothing from the Roman allodial estate except in its escheatable quality, which is a feature it has retained from the Eng. fee simple; this feature is not however exactly the same, for here when there is a failure of heirs, the land escheats [illegible] State, & not as in Eng. to the next Superior Lo[illegible] A fee simple here, & at the present day in Eng. vests the possessor with an absolute power of disposing of the estate to every lawful purpose — In order to the vesting a fee simple, by Deed the words "to him (the Grantee) & his heirs forever", are absolutely necessary, & there is no admissible substitute for the word "heirs", in such Deed & yet the heir in such case takes nothing immediately by the deed, for no one can be an heir to the living, but the word is used entirely to denote the quantity of estate, & not to whom it shall go, for it is wholly in the power of the grantee, & he may deprive his descendants of it at pleasure. Under the Norman jurisprudence in the early periods of the Eng. law, the fee which was parcelled out among the dependents of the Great Barons was a mere estate at will of the Lord — By degrees the estates of the vassals became more certain & permanent — the first step was to estates, for a definite period of time, & then to grants to [illegible] forever, but under the feudal system no such thing as a descendable or alienable estate strictly speaking [illegible]

these last mentioned grants were construed to be grants for the life of the grantee; so that when by another step in the improvement of this system, estates became descendable to the Children of the tenant, it became necessary to make use of some words in the Grant indicative of an intention to convey a descendable interest, & the word heirs was the one chosen for that purpose — these fee simple estates did not acquire their alienable quality untill the Stat. of quia emtores passed the 18th Edward 1st* — The term heirs denotes a class of people & not any particular individuals — This nicety respecting the use of the term heirs in the creation of fee simple estates, is departed from in Case of Wills — the reason assigned by writers is that wills are often made in extremis, & when the testator is generally of necessity without counsel; but it is apprehended that the true reason is that the use of Devises being of a much later date than the mode of conveyance by Deed, the minds of Lawyers were much more liberalized when the former first came to be ~~expounded~~ construed, & of course a more liberal system with respect to them was adopted than ~~was~~ had been gone into with respect to deeds — there being no reason why the intention of the Grantor in a Deed should not be pursued as well as that of a testator in a Devise, but so is the law — Considering the great advantage of certainty in law, perhaps this nicety is not so exceptionable as might be at first immagined —

*This Stat. however, checked the in-[...]bited their feud-[...]tions; or-[...]ing [...]att.[...] alie-[...]e there-[...] hold as the Chief [...]d of fee [...]d of [...]mme[...]te ali-[...] a [...] Blac. Com. 91 —

Of the Conveyance of Real Estate

When a fee simple is conveyed by apt words, any proviso in the deed not consistant with the nature of such an estate, as that the grantee shall not alien, or that there shall be a limitation over, or the like is void; but in the case of the Devise of a fee simple a remainder over may be limited upon a contingency as if one give an estate to A. & his heirs forever, but in the event of his dying ~~without heirs~~ before the testator, then to B. & his heirs; for here the estate never vested in A, the rule therefore is not impugned.

Vaug. 269 Cro. Eliz. 591-

The rule respecting the construction of Devises is this that the intention of the Devisor is to be followed if consistent with the rules of law – the rule as thus worded is ambiguous – the true solution of the difficulty seems to be this (tho' all the Cases will not exactly compare with this construction) that the restrictive clause justly construed, is applicable only to the nature of the estate, & not to any set of words made use of in the Devise which are untechnical – but that any set of words which are sufficiently demonstrative of the testator's intention to convey a fee simple, will be adequate to the creation of that species of estate – But when the testator attempts to convey such an estate as the law prohibits, as to shackle a legal estate with illegal conditions, he in so doing goes contrary to the rules of law & therefore his Devise thus far void. No new quality can be annexed to an estate by will which can not be by deed, the law in this respect is not to bend to the inclinations of the testator – Considering the restrictive clause of the rule in this

Of Conveyances by Deed & ~~Will~~ Devise –

point of light as applicable to the nature of the estate & not to the words by which the intention is expressed, most of the Cases upon the point are reconcileable, upon the rule, tho' the Courts do not

Doug. seem to be fully ~~se~~ sensible that this is the just

323 construction of the rule — It has been adjudged that a devise should carry a fee simple when expressed in these words, (viz) "I give to I.S. an estate in fee simple" — again – "I give to I.S. all my estate" – has been holden to convey a fee, the testator having such an estate in the premises – again – I give to I.S. my land in Dale, upon condition of his paying a certain legacy, is a good bequest of a fee upon performance of the condition – But if it had been only a bequest of all ye testator's farm in Dale ~~w~~ without more said, ~~is~~ only an estate for life would pass —— I give to I.S. my farm on condition of paying A. 100£ out of the annual profits, vests not a fee, for

Doug. by accepting it the Devisee is bound only to pay out of

14. Salk. the annual profits, & not to pay at all events – I

34. Lev. give to I.S. my estate forever, conveys a fee – so too

91. Wil. the words all my estate – But the words all my esta-

24. Rep. te in Dale, conveys only a life estate, the word all is

12. merely a word of locality, & not expressive of the quan-

tity of interest, this last case however is opposed by some cases, & does not seem conformable to the spi-

rit of the forgoing rule – the words all my effects real & personal, & all I am worth, pass a fee – When authorities are found to clash in a case, resort must be had to the foregoing rule, for by this all the judges profess to be governed, & then, or such decisions as are consistent with the maxim are to be considered as law & those which are repugnant to it are to be rejected as not law –

Of Conveyances by Deed & Devise

It is a maxim of the Eng. law that "nemo est heres viventis"; so that any grant or bequest to the heirs of any person, that person being alive, is a nullity - as if A. bequeath an estate to B. & his heirs, if B. dies in the lifetime of A. leaving heirs still those heirs can take nothing by the bequest, for it lapses upon the death of B.; but when to the epithet "heirs", in this case is added, some other words particularly an individual, as to the heirs of that son now living, or the like, such bequest may be good. So that it seems, when upon the will it is discoverable that a particular person is meant, the improper epithet "heir", being helped by some accompanying descriptive words the estate may pass —

Contra T. Raym. 330—

Estates tail —

The proper technical words necessary in the creation of an estate tail, is to one & the heirs of his body; perhaps even in a Deed, the word, body, may be supplied by other words of procreation tantamount, but the word heirs is absolutely indispensible — In case of conveyance by Devise the same relaxation are indulged as in devises of a fee simple - the rule also is in this case the same, that the Intention is to govern when consistent with the rules of law — After the Stat. of Quia emptores

the Barons or principal landholders many of them through extravagance & other causes, were under the necessity of aliening their real estate, whereby their families became indigent – to prevent such mortify-ing consequences, the Nobles attempted to render their estates inalienable, by inserting in their grants the word bodies, after heirs; as to J. S. & the heirs of his body – This for a time checked alienation: but an evasion was soon sought out & sanctioned by the Courts – The meaning of those grants were determined to be, that no alienation should take place untill issue born. but that imme-diately upon the birth of issue, the grantee had a right to alien – this tenure is denominated by writers a fee simple conditional at Com. law – After many struggles the Nobles finally in the 13th of Edw. I got the Stat. de donis passed, which for a time firmly fixed the right of entailment according to the true design of the donor: but new evasions were devised by the sub-tilty of the judges assisted by the royal authority & the spirit of the times; so that in the reign of Ed. 4. the fiction of com. recovery, was declared to be an ef-fectual bar to the issue in tail*, & the estate thereby reduced to a fee simple – Other methods of docking en-tails were afterwards devised, as by fine: & the Stat. against high treason made these estates forfeitable
until 5 years be past after the Estate in tail spent –
so that now no entailment can possibly be so made that it cannot be docked – An entailment may be either general or special, tail male gen. or special &c; & in case of tail male, the heirs must derive his descent all the way through males, or his title is gone

Of Estates tail &c

When an Estate is entailed there is always a rever-
-tion in the Donor & his heirs; but this may take
away by docking the intailment— But the
-rest in such reversion during the existence of
intailment, is so remote & uncertain as not to
esteemed of sufficient importance to induce
Court of Chancery to decree a sale of it for the
purpose of paying debts— a fee simple has in
one instance this quality of reversion incident
to it; & that is when granted to a Corporation; for
upon the disolution of the Corporation the estate re-
-erts to the original Donor or his heirs—
One of the privileges incident to an estate tail, is that
the tenant is not impeachable for waste— If a ten-
-ant aliences in fee, it will not as in case of a life
estate work a forfeiture, but such alienation will
have no effect upon the rights of the heir in tail
or reversioner, for the grantee takes by such
conveyance, only such right as the grantor was
possessed of, to wit: a life estate— The grantee
in such case might be ousted by the heir in tail &
is not liable to him for the profits of the estate dur-
-ing the life of the grantor, as a trespassor, tho' for
the profits of the estate for such time as he con-
-tinued to hold the estate after the death of the gran-
-tor, such grantee would be liable to the heir in
tail— The New York law of entailments formerly
regulated by the same rules as the Eng. is, & after-
wards for a short time by their own Stat. is
now wholy abrogated, & no such estate allowed—

Of Estates tail &c Cont.d law—

Previous to the passing of our Stat. of entailments in the year 1784 there had been a diversity of opinions respecting our law upon this head — but a determination of Court had fixed it at something very different from the Eng. law (viz). that the gift vested a fee tail in the immediate donee, but a fee simple in his issue; & the principles of this decission was adopted by the Stat. — It has then been questioned whether ~~and~~ the Donee has any thing more than a life estate with remainder to his issue; in point of duration such tenant has no more than a life estate in such grant, but as to all other considerations he has an estate tail, all the incidents of an estate tail being annexed to it — considering it in this point of view, (which is doubtless the true one) some important consequences to the heirs may happen, as in the Case of a tail male, or female: for tho' the property in fee vests in the issue of the grantee by force of the Stat., yet the grant directs to which description of issue it shall go, as to male issue to the exclusion of females, in case of a tail male, so that in that case if there be no male issue the estate would revert to the Donor or his heirs, his daughters not being within the terms of the grant — Entailments cannot be docked in this State —

Tenant in tail after possibility of issue Extinct, is an estate between a tail & an estate for life —

Tenancy in tail after possibility &c.

This estate growes out of a special entailment. As when an estate is given to A. & the heirs of his body upon the body of his then wife to be begotten. & the wife dies without issue, or leaving issue such issue becomes extinct tho' the possibility of the estate's continuing is at an end, still the husb. shall hold during life — Nothing but the death of the person from whom the issue was to spring is sufficient to raise this estate; for tho' the parties be an hundred years old, still the law will presume a possibility of issue — This estate has some of the incidents of an estate tail & some of those of an estate for life — The tenant is not punishable for waste; but
Co. L. 28 if he alienes in fee it is a forfeiture —

Estates for Life —

Estates are created either by act of law or by act of the parties — Every grant of lands for an indeterminate period of time, is an estate for life provided it may by possibility last for life — as
Co. L. 42 a grant to a woman durante viduetate — When a lease is made for life without specifying whose life, it is always taken to be for the life of the grantee, provided the grantor had power to grant such a lease — A tenant for life is punishable for waste — he is liable to forfeit the estate, according to the Eng. law, if he alienes in fee & the alienee is considered as a mere trespassor — The

whether an alienation would work a forfeiture in this State is perhaps doubtful, as it does not seem to be founded on the best reason

Of Courtesy —

Courtesy is an estate which a man has in the real property of his wife after her death — The circumstances necessary to create this Estate are the following (viz) The wife must be seized of a descendable estate either fee simple or fee tail, to which her issue could by possibility have inherited — & she must have had such inheritable issue born alive — the commencement of these circumstances give the husb. a right of Courtesy during life, whether the issue survive or not — & it is not necessary that the wife die siezed, for if she was seized at any time during the Coverture it is sufficient, tho' she was afterwards dis-seized — In Connecticut entry on land is not necessary as in Eng. to give a siezin, for every one who has the legal right to land is considered as being siezed of it, unless there is some one in possession holding him out, therefore, no actual siezin in the wife is necessary here, except in the case mentioned, & then an ouster of the adverse possessor, without a siezin is enough — There has been one decision in this State that the husb. tenant by the Courtesy shall not hold against the lineal heir of the wife after he comes of age, but against collaterals for life — whether this decision can be considered as settling the law is doubtful — Our Charter from Car. 2d was that our lands should be holden according tenure of East Greenwich in Kent, a gavilkind tenure — the customs of this tenure we have, however, not adopted as it respects Courtesy — which was of one half of land &c, the birth of issue was not material, & the Courtesy ceased on a 2d marriage —

Of Dower — According to Eng. Law

A woman by her marriage is entitled to be endowed of one third of all the inheritable real est. of which her husband was seised either in deed or in law at any time during coverture, provided the issue of her body by such marriage could by possibility have inherited such estate; & it is of no consequence whether there be issue of the marriage or not — Dower is paramount to all other claims or titles whatever — it cannot be devised away by will nor taken for debt untill the wife's term expires — The qualities of this estate are the same that are incident to a conventional estate for life — If the heir does not within 40 Days after the death of the ancestor, set out the dower to the widow, she may have her writ of dower — In order to be entitled to dower the wife must be at least Nine years old at the time of her husb.'s death — this right is taken away by a divorce a vinculo matrimonii — by elopement with an adulterer, unless her husb. afterwards reconciled to her — by jointure by force of the Stat. of Hen. 8th — such jointure in order absolutely to bar dower must be made before marriage — must be of real estate for life of the wife at least to commence immediately upon the death of the husb. & must be competent, & if destitute of any of these requisites by the Stat. pointed out it will be insufficient to bar dower — but whenever dower is claimed through the insufficiency of the jointure, the jointure must be wholly renounced — When the jointure is made after marriage always she has her election

Of Dower according to Connecticut Law

In Connecticut the wife is entitled to be endowed only of one third part of such real estate as the husb. died possessed of — Whether the word possessed in our Stat. is synonymous with seized is a doubt — the word seized here certainly means not only an actual but a potential seizin also — but it is by some alledged that the word possessed can only mean an actual possession — this construction however does not seem to accord with the true meaning of the Stat. & as yet never been sanctioned by a decision — Application is in the first instance made to the Court of Probate to set out the dower; upon which the judge appoints three freeholders who do this business; from whose doings when returned & accepted by the judge, the heir may appeal (it then becoming by such acceptance a judgt. of the Probate) to the Supr. Court; but pending the appeal the widow goes into possession — A divorce a vinculo matrimonii does not destroy the right of dower, except where the wife is the faulty party — Our Stat. relative to jointure seems to countenance the idea of a jointure of personal estate being sufficient to bar dower — but this is a very doubtful point & has been strengthened by no decision — Should a man convey away his propy. to his children or others without a consideration, for the purpose of depriving the widow of her dower, the widow it is thought, would be put in the same situation as Creditors are in respect to such conveyance & might treat it as fraudulent ~~upon her~~ & void — And by another principle of law such fraudulent design would be frustrated: for those dispositions are generally made in contemplation of death; & such dispositions tho' made in the form of — Deeds have been construed to operate as testamentary dispositions, & no testament can bar Dower. The correctness of these notions may well be doubted —

Of Conveyance of Real Estates &c

These words, "I give blackacre to A. for life remain-
-der to his heirs in fee [or in tail, or other words expressive
of such intention] have been adjudged to pass a fee
simple [or fee tail as the case may be] in A. notwith-
-standing the words for life — for the term heirs tech-
-nically denoting the quantity of estate & not being
proper words of purchase, the words for life were
rejected as surplusage & the estate considered as vest-
-ing in the first donee as an inheritable interest.
Of this construction there is no dispute, but when
other words are found in the grant plainly indica-
-tive ~~of the intention~~ of the grantor's intention that
the immediate donee should have only an estate for
life, & that the fee should vest in his issue the decisions
have been contradictory — & yet all the judges
agree in this, that when the term heir is used only
to designate some particular person, & not heirs in
general & this intention is manifest the intention
of the grantor is to be followed, the technical mean-
-ing of the words notwithstanding, & the first donee
1st. C. 66. take an estate for life. ~~& i~~ But when it appears
93. Co.
2. 313
Chay. that by the term heirs, is meant heirs general
2 o/2 3
1. Vent & yet other words expressive of the design of confin-
231 —
2. Atk.
247 — ing a life estate only to the immediate donee, are
1st. Sa. 412
1st. P. Wils. used, the determinations are variant & inconsista-
129. 144.
Bur. ble, & it is not easy to determine in which scale the
1103 —
2579.
Pow. on weight of authority lies —
Dev.
356.

It is a Maxim in the Eng. law that no freehold can be
created to commence in future unless supported by
an intermediate estate of freehold, & so the freehold
estate limited by way of remainder — Such freehold

remainder may however be limitted upon an estate for years, provided the tenant for years as atty to the remainder, man be invested with livery of seisin & not otherwise; for it is necessary that the freehold do pass immediately out of the grantor — This strictness as it respects feoffments & grants does not obtain in all its strictness force as it respects devises — for there it is allowable to pass a freehold not only to persons in esse — but also to the unborn issue of persons now in esse, this by way of executory devise — Our Stat. by permitting lands to be transferred by all other kinds of conveyances as well as by will, to the unborn issue of persons in esse has put all conveyances upon the footing of Executory devises in England —

Estates for years —

All those estates which have a fixed time for their commencement & continuance are estates for years, be they for a longer or shorter time — they are mere chattel interests & go to the Executor — they may commence in futuro & no actual entry, as in case of freeholds, is necessary to compleat the title — and since the Stat. of frauds no parol lease for a longer term than three years is good In this State no parol lease for any time will give a title — nor can a rent reserved upon such lease be recovered in an action upon the contract; but yet such lessee can not be proceeded against as a trespasser unless he continue to hold after a notice to depart — & tho' an action as for rent will not lie against such lessee yet Ass.t for the use of the land will lie against him —

And in case of such lease, if the lessor suffer the lessee to continue in possession & accepts of the stipulated rent, & afterwards attempts to turn him off. Chan. will interpose, & compel such lessor to give a written lease — & if a suit at Law is brought, it is an established principle that a Grantor shall not take advantage of a defect in the title of his own grant which Chan. would compell him to amend — Lease hold property is forfeitable for waste as estates for life are — In this State lands given for public uses are forbidden to be aliened in fee, & it is doubtful whether long leases for 1,000 years & for a gross sum are not within the meaning of the Stat., which says the lands shall be kept for the constant emolument of the institution to which it is given —

Estates at Will —

An estate at will seems properly neither real nor personal estate, going neither to the heir nor Ex.[rs] — this Estate may be determined at any time at the option either of the lessor or lessee — but yet the lessor shall not so determine the estate as to injure the lessee by depriving him of the emblements — Not only a verbal declaration, but any act of ownership incompatible with the tenancy, is a determination of the tenancy — So waste or the like in the tenant is a determination of the estate — & by further con

-nance after a determination of the will in any way makes the tenant a trespassor —

A tenancy at Sufferance is a species of estate at will – it happens when a tenant for any determinate time holds over by connivance of the lessor: & he is not by such continuance a trespassor untill notified to depart, unless he commit waste or the like —

Of Emblements —

As to the question, who is to have the emblements, the rule is that the tenant is never to lose them unless it was through his fault or by his act ~~that~~ the emblements were growing when the right of the lessor or revertioner accrued to the land; & that known to the tenant

N.B. The Exr. in case of a fee, is to have the emblements & not the heir, but otherwise it is with a Devisee who it seems, shall have the emblements. Notes on Co. L. fol. 55 b

In the State of New York, they have a Stat. which does away all kinds of entailments & declares that form of words before used for the creation of an estate tail, effectual to the creation of a fee simple in both Deeds & Devises —

In that State too, they have a Stat. which directs that estates per autre vie, in the event of the tenants dying before cestui que vie, shall be considered as personal estate & go to the Executor of such tenant for the remainder of the term — And another Statute declares that the widows of such persons as are attainted of treason shall not lose their Dower ——

Of Incorporeal tenements

Of those incorporeal hereditaments which are com in this State, an Annuity is one - Annuity either real or personal, free hold or less may be erected in an annuity, that may be in tail except a fee tail which can not in Eng. be created by means of the Stat. de donis which regulates all matters of entailment in that Country. But perhaps, in this State the principles of fee tail at Com. Law (or fee simple conditional at com. law as the books term it) being considered as well as Stat. de donis, an entailment of an annuity might be good as far as any other entailment (viz) vesting a fee simple in the second donee in tail. Dower & Courtesy are not incidental to this species
2. Woods. 72 of property. & in some other particulars it is like personal chattels - Annuities are transferable like
2. L. 144 other property -

Rents are another species of incorporeal hereditaments, but are of little use in this Country for our usual mode of securing the profits of land is by taking Notes for the hire of it. which is a thing very different from the technical idea of rent - The property which one has in a Rent is the same which he has in the land, & when the term in the land is transferred the rent is also the property of the reversioner, & if the Reversioner aliens the reversion, the rent goes to the alienee without being mentioned in the Grant - and it is a frequent practice to aliene their lands

fee simple & yet reserve a rent in fee, which rent is assignable without consent of the owner of the land, & he must pay such alienee when noti-fied— The rent which is in arrear when the per-son to whom it is reserved dies is a personal Chattel & goes to the Executor as well as that which is already received— It is the grow-ing rent only that is of the Realty & goes to the heir, & yet the rent due cannot go to the Exr. be-fore the day of paym.t for untill that time it is a growing rent—

It is observable of Annuities that they are made by Deed which purports to bind the grantor & his heirs— & by this Deed the Grantor is bound at all events, & so is the heir as far as he recieves assets from the grantor but no farther—

Rights of Way—

This species of propy too is capable of the same permanency as the others mentioned— In Eng. this is usually a prescriptive right, & forever incumbers the land through which the right is once obtained, provided it be a perpetual right— In this State no such thing as a prescriptive title is recognized; but a right of way may be created by grant. & if in the Deed the grantor binds his assigns as well as him-self, the incumbrance will be perpetual—

but the right of way is appurtenant to lan[d]
and can not be aliened without the land to
which it is appurtenant — But a righ[t]
of way to one for life is a personal pri-
-lege & can not be assigned upon any con[di]-
-tions — A right of way may be created [by]
implication of law. as when one sells lan[d]
which has no other access to it than over his
land, he also sells with it a ~~necessary~~ righ[t]
of way to it, if necessary to the enjoyment [of]
such granted lands — this way is not usu[ally]
marked out as being confined to one parti-
-cular place, but must be taken in a reas[on]-
-able place so as not to be very inconveni[ent]
either to the owner of the way, or of the lan[d]
but the interest of both is to be consulted
In this State there has a custom aris[en]
of selling streams of water without th[e]
land, & in case of such grant it has be[en]
determined that so much land as is req[ui]-
-site for the enjoyment of the water in th[e]
way designed shall go with the strea[m]
& be considered as included in the grant [as]
a mill place, a place to fasten the dam &

Of Mortgages.

A Mortgage is a collateral security, generally for the paym.t of a precedent debt. It may be made either of a fee simple, fee tail, a life estate, or an estate for years: in short of any kind of Estate in things of a permanent nature except in estates at Will & at Sufferance. The Mortgage is no discharge of the Debt; for after the mortgagee has ejected the Mortgagor, still he may pursue his remedy upon the direct security for the Debt & recover. It was formerly a question in whom the fee of the land was between the time of executing the Mortgage & the day allowed for payment, but it is now settled that the fee passes immediately into the Mortgagee, liable, indeed, to be defeated by paym.t of the money at the day stipulated. But upon the nonpaym.t of the money the fee (whether it be fee simple or fee tail) vests absolutely & at Law indefeasibly in the Mortgagee. Still however the Mortgagor & his heirs have a species of property in the land after the law day is passed, called Equity of redemption. for by an application to Chan. at any time after the law day is past, a Decree may be obtained, if it be judged reasonable, compelling the Mortgagee to reconvey, or his heirs, if he be dead, upon paym.t of principal, Int.t & Costs. In this business the Court of Chan. do not pretend to contravert the legallity of the Mortgagee's

title, nor to give a title to the Mortgagor, they do what is equivalent to it viz. enjoin Mortgagee under a heavy penalty of much more than the value of the land, to reconvey Payment, or tender & refusal, (which to the purpose is equally effectual) at the day specified, revests the title in the Mortgagor, but if the Mortgagee be refractory & will not make a reconveyance of the land — the mortgagor may (if the Mortgagee be in possession) bring his Eject. a judgt. in which is a good evidence of title upon record — but if the Mortgagor has been suffered to remain in possession he has no remedy at Law, but must go into Chan. to obtain the evidence of title & Chan. in such case will decree a reconveyance in form under a sufficient penalty, & if the Mortgagee be a bankrupt, so as that a penalty would be ineffectual, the Chancellor will act in rem, making a decree quieting the Mortgagor in the possession against the Mortgagee & all claiming under him — & this is the only instance in which Chan. will make a decree in rem respecting Mortgages viz. when the legal title is in the Mortgagor but the evidence of such title in the Mortgagee. For if the law day be once expired before payment the equity of redemption only remains, Chan. will not quiet in the possession, but only on payment & a reconveyance under a penalty — Again — on payt. or tender on the day, Chan. will consider Mortgagee as a trustee for the Mortgagor, & it is a principal in Equity, that in Case of a trustee refusing

will be made — If a tender of the Mortgage money be made, but the Mortgagee refuse it, & would contest the legallity of the tender, & brings his Eject. against the Mortgagor, the latter need not go into Chan. to get the evidence of his title, for by making proof of a proper tender, judg. will be in his favor, & the evidence of his title thereby established — these methods are some of them often necessary that the evidence of the Mortgagor's title might not depend on such uncertain grounds as that of living witnesses of the actual paym.t or tender according to the Condition of the Mortgage — A tender at the day, if refused has no other effect than that of taking away the collateral security, for the debt remains in the same situation as any other debt does after tender & refusal, except in one Case, which is where there is only a promised gratuity & no other debt secured by the Mortgage & for which gratuity the Mortgagee holds no other security than the Mortgage: for here a tender being made at the proper time revests the title in the Mortgagor, which was the only evidence of the Mortgagee's claim upon the Mortgagor — The Mortgagor while in possession is in some respects as a tenant at will, for the Mortgagee may at any time turn him out of possession, without even suffering him to take the emblements, to which however, a mere tenant at will would ordinarily be entitled — Neither does the Mortgagor in-

Of Mortgages—

possession pay rent nor account for the rents & profits, for the land which is a mere pledge for the security of the debt— But when the Mortgagee goes into possession, he is accountable, upon redemption of the premises, for the rents & profits during such occupancy, & for the emblements likewise, which were upon the land when he ousted the Mortgagor; & the amount of such rents & profits &c go towards the discharge of the Mortgage debt & Int., & the Mortgagor need tender no more than the balance due after deducting the amt. of such rents &c, & if the use of the land during such possession of the Mortgagee, be equal to or of greater value than the amt. of the debt, nothing need be tendered, for such rents &c will be deemed a paym.t of the debt— In estimating the rents & profits no certain rule can be fixed, but the Court must act discretionarily—

If the Mortgagee during his possession has erected buildings, fences &c upon the land, he will be allowed in the adjustment for such improvements of the property (which in Con.t are called betterments) to the extent of what would be reasonable or proper for the Mortgagor, but not for such improvements, as were dictated merely by fancy & extravagance — One principle in the law relative to Mortgages, is ~~one~~ that once a mortgage & always a mortgage, & that no expression to the contrary in a deed can cut off the Equity of redemption

2 Atk. 494

Of Mortgages

As to the Equity of Redemption, the case is materi-ally different as it respects third persons, whether the defeasance is on the Deed, or on a seperate piece of paper for when the condition is tacked to, or written on the Deed, every subsequent alienee knowingly takes the land with the incumberance of the right of redemp-tion - & the Mortgagor, & those in his right, are at their election to bring in to court the Mortgagee, or his assignee, upon a petition to redeem, & compell him to reconvey, for every alienee knows the con-dition upon which he purchased; & therefore upon tender made, is compellable to reconvey under a penalty, if the Mortgagor prefers calling upon him to calling upon the Mortgagee - but in such Case the Court will not impose a heavy penalty, nor one much above the value of the land, for the Mortgagee may be a bankrupt & so the alienee remediless - But when the Defeasance is a seperate instrument & not tacked to the Deed, the subsequent alienee cannot be sup-posed to be acquainted with the incumbrance & there-fore not liable to reconvey; & in such case the Mortgagee & his heirs can alone be called on for a reconveyance - & here arises a qualified exception to the Maxim of once a mortgage & always a Mortgage - Another & more proper exception is, when the Mortgagee purchases of the Mortgagor the equity of redemption; & if that purchase be made, even with this condition tacked to it, that if the Mortgagor shall by a day certain pay up the orig. debt & refund the price rec.d for the Equity of redemption that then the Mortgagee should reconvey; this

condition must be strictly performed, for if the Mortgagor do not pay the money by the time in the condition of such after contract so there accrues to him no further equity of redemption. & the sale of the equity is absolute both at
15th Viner 468 law & equity — An other exception is in a mortgage made to secure a gratuity. as if A. would advance B. in the world, & gives him a Mortgage to secure him the sum he intends him & dies without accomplying the redemption by paying the promised portion
2d Vent. 364. 1 Eq. Ab. 511 the redemption day being passed, the mortgaged premises are irredeemable — Further. to favor the intention of such family arrangements. it has been determined that if one Brother borrow money of other & mortgage to him his farm, with a condition annexed, that if the money be not paid in the life time of the Mortgagor, & upon the further contingency of his leaving no Male heirs. the land should be irredeemable. such condition is good & absolute. Whether a parol agreement may be set up to control an absolute deed, so as to make it be treated as a Mortgage, has been a question — as a general position such agreement cannot be allowed in p[...] but yet, if the Mortgagee when the deed is made, promises to execute a defeasance. but through fraud accident, or negligence it be not done, such parol agreement is proveable in Chan., & a performance of the premise may be decreed thereupon — But if there be only a promise to reconvey on paym.t of the money no proof of such promise will be allowed —

And yet it is said, that if the Petitioner will trust to the conscience of the adverse party, stating all the circumstances of the agreement particularly & calling upon his antagonist to disclose the fact, if the Petitionee confess the agreement to reconvey, Chan. will interpose & decree a reconveyance, or a defeasance to be made — and quere if the Stat. of frauds may not be pleaded in all such cases, & a disclosure avoided — but yet if there be a disclosure of the fact of such agreement to reconvey or make a Defeasance, but yet it appear that the conveyance was thus made absolute & with a fraudulent intent of cheating others out of their just dues, or the like, Chan. after such disclosure will make no decree in favor of such particeps criminis. In case where the deed is an absolute one & no promise of a defeasance is in proof, yet if the parties always treat the conveyance as a mortgage, as if the grantor always remains in possession disposing of the profits of the land, & the grantee is receiving the interest of a sum of money from the grantor; or if the grantee bring a Petition of foreclosure, or do any thing else whereby it is apparent that the parties consider it as a mortgage, the Court of Chan. will so consider it — A Mortgagor in possession may lease out the premises & the lease will be good against him & all others except the mortgagee who may at pleasure oust the Mortgagor of possession & treat his lessee as a trespassor & maintain an

Preced. in Chan. 526. Gordon 2. Vol. 430. Prof. 302

Doug. 21. action against him as such without prev notice - in the case quoted it was by counsel alledged that if such an action were allowed the lessee would be liable for mean profits but this is not so - for it is of the nature of a mortgage that the Mortgagor should remain in possession & take the rents & profits of the land without accounting, & such lessee being in the place of the Mortgagor, is entitled to the same favor - further if the lessee be a trespasser the Mortgagor according to the rules of law in other cases would be considered as a dissiesor, but the lessee of a dissiesor tho' liable in trespass to
Ibid 54 - the owner is not so for the mean profits -

Other persons Interested may redeem as well as the Mortgagor, as his heir, his Creditor &c The lessee of a Mortgagor may be so interested as to have a right to redeem & that too when sued as a trespassor - the Mortgagee may if he choose, treat the lessee of the Mortgagor as his tenant, instead of treating him as a trespasser & compell him to pay over into his hands the rent received on the lease, & so his possession will be as effectual as if he had ejected the
Doug. 266. Mortgagor - If the Mortgagor in possession commit waste Chan. will restrain him on the Petition of the Mortgagee, if he prefer this
3 Atk. 723 redress to proceeding by ejectment - An Equity of redemption is considered to be an Estate of such nature as to give the Mortgagor a settlement where
Ibid. 66 the Estate lies of which he is in possession as Mortgagor -

Of Mortgages —

By a Stat. of the 7th of Go. 2d. when the day of redemp-
-tion is past & the Mortgagor still in possession
so that an exact tender can be made, & is made
the Mortgagee can not maintain an Eject. for
the Land, but the Stat. makes no alteration in the
law as it respects the rights of the parties untill the
law day is past — neither does it if the Mortgagee is
in possession — Conformably to the principles
of this Stat. there has been one decision in
this State & another in the State of N. York; but
neither State having adopted this Stat. in form
it is hard to see upon what ground ye Courts went.
It has become a question in this State & others where
they have a similar Statute authorizing a sale of land
for the paym.t of taxes, redeemable within a year, whether
these sales are not to be considered in the light of Mortgages,
perhaps this is a speculative refinement, tho' plausible
arguments may be advanced in favor of it — for the
Legislature have used in the Stat. the same form of words
which at Com. law, in conveyances constitute a Mort-
-gage, without giving any new definition to them —
& furthermore, in this State there is an explanatory
Stat. providing that if the orig.l owner does not redeem
within the year, any of his Creditors may redeem, &
after the owner redeem out of his hands, which seems
to indicate that his right of redemption was not extin-
-guished by suffering the year to elapse, but only that
the Credrs. by that means had a concurrent right of
redemption after the year, tho' not before which however is
different from the Com. law, tho' that seems to recog.e a prior right in y.e Mortga.

Of Mortgages

There is another exception to the maxim of once a mortgage & always a mortgage; it arises out of our law relative to the levy of Executions upon land. If the Mortgagee will pursue his remedy upon the obligation to judg.d & then levy his Execution upon the mortgaged premises & have them appraised off to him the lien by way of Mortgage is by such mode extinguished, & with it the equity of redemption, so that the lands thus appraised off vest absolutely in the Creditor, in the same manner as if they had never been mortgaged to him —

When a Mortgagee in possession lays out any thing for
3 Atk. 518 the reasonable improvement of the Mortgaged premises he is allowed interest on the sums laid out — If a Mortgagee in possession commits waste Chan. will restrain him by injunction, & order the amt. of the waste
Ibid. 723 to be applied to the discharge of the Mortgage debt — but yet if the mortgaged premises be of no value except for the timber, & the Mortgagee cut it off he would not be restrained, for without such privilege the security would be of no avail — There is but one case in which an Interested person can not redeem, & that is the Case of the ~~wife~~ widow of the Mortgagor, & for this exception there seems no good reason — if however she will punctually keep down the Interest of one third of the debt she may be endowed ~~in~~ the Mortgaged premises of a term for years —
An Equity of redemption is alienable & descendable in the same way that the land was, tho' to many purposes it is not considered as real estate; it will

ever pass in a Devise under the words, "all my Lands," or "real Estate"— A subsequent Mortgagee may purchase in a previous Mortgage & in this he is to be preferred to the right of redemption in others: but when he has purchased it in, it may be redeemed out of his hands by any other interested person, he paying up all the sums which were given as the consideration of the several liens
1 Vin. 52. by such holder obtained— When an Estate is devised to one for life, remainder to another in fee, & is mortgaged, if the Devisee for life would redeem but the remainder man in fee refuse to assist, such remainder man will still be deemed to pay his proportion, which is estimated at two thirds, & if he refuse paymt. so that the tenant for life have to advance the whole of the redemption money, the inheritance will descend to the heir of the tenant for life untill such proportion is paid by such remainder man or his descendants— And if it be the remainder man in fee who ~~redee~~ petitions to redeeme, the devisee for life must pay one third part, & if he refuses he thereby forfeits his claim to the estate into the hands of such remainder man, untill he will comply by paying his proportion— But if the remainder man does not apply by his bill to have the life man pay a third untill after the death of such devisee for life, & that happen in less than seven years, his heirs will not be compelled to pay so much as one third, but the Court will apportion

the sum to be by them paid according to the time which the ~~ten~~ devisee for life lived; but in all events such heirs must pay some part of the redemption money—

1st P. Wil. 412 — 1st Do. 341. — 2d Atk. 50 — At law, an equity of redemption is not consider'd as assets ~~in the hands~~ for the paym.t of debts, but in Equity it is, & equitable assets too — But where the equity of redemption is devised for the paym.t of debts, tho' equitable assets, yet those who by means of Mortgages have a lien upon the land must first be satisfied, & then the remainder must

1st Ver. 101. be divided pari passu according to the rule of equitable assets.

In Connecticut an Equity of redemption is attach-able like any real property — the land indeed is levied in this case is appraised off under the incumbrance of the mortgage —

It is a principle in the law respecting Mortgages, that when the Mortgagor will redeem he must pay not only the Mortgage money, but all other bond debts due from the Mortgagor to & in Connecticut all other debts also whether contracted before or after the mortgage; & it is the same whether the orig. Creditor was the orig.l mortgagee, or a purchaser of the mortgage — This rule holds in the extent only between the Mortgagor & his heirs & the Mortgagee or his assignee — & in this State even the heir of the Mortgagor is not within the rule, for he not being liable to pay the bond Debts of his ancestor is compellable to pay nothing further than the mortgage money in order to redeem —

Of Mortgages—

When the mortgaged premises, or equity of redemption is devised it is holden in the devisees hands not only for the mortgage money, but for all debts chargeable upon the land; for the devise as far as it goes to defraud Creditors by specialty, is by Stat. of Wil. 3d. void and when the mere equity of redemption is by decree in Chan. made liable for debts, it is liable for all kinds of debts both specialty & simple contract & is equitable assets— But when an alienee of the right of redemption, or a subsequent Mortgagee will redeem he is obliged to pay nothing but the Mortgage money— And when a Creditor would redeem, if there has been the least collusion or fraud between the Mortgagor & mortgagee relative to the subsisting debts due from the former to the latter, he must redeem by paying over the mortgage money— Our Courts have decided in the case of a redeeming Creditor, that such debts as were due to the Mortgagee from the Mortgagor over & above the Mortgage debt, before the debt of the redeeming Creditor, & were bona fide, must be paid by such Creditor on redemption— but if such Debt accrued to the Mortgagee after the Debt due the Creditor, the Creditor will not be holden to pay it on redemption, but only the Mortgage debt—

2d Stra. 1107 – Pre. Chan. 87. 511 – 2d Atk. 50 – 3d do. 556 – 1st Vez. 87

When there are several Mortgages for different sums between the same parties, a subsequent Mortgagee may redeem one without being obliged to redeem all— If one purchase in a Mortgage at a discount yet must the Mortgagor if he redeems pay the whole debt

Of Mortgages—

But if the heir, agent or trustee of the Mortgagor purchase in the Mortgage at a discount of the Mortgagee; or any other species of incumbrance of the incumbrancer, the Creditor who would redeem may do it by paying only such reduced sum or discount price, for he is not to lose by such bargain made for the benefit of the Mortgagor or his heirs— neither will the heir be lose, for he may if he thinks proper again redeem out of such Creditor or other
Cont. 49 interested person's hands, by satisfying such
Salk. 155
2 Atk 54— person's demands—

Notwithstanding the truth of the maxim of once a mortgage always a mortgage as a gen. rule yet in analogy to the Stat. of Limitations relating to Eject^t in Eng. no redemption will be allowed after a twenty years possession of the Mortgagee after the expiration of the time of redemption limited in the conveyance, unless some act of the parties or of one of them shewing that they considered it as a Mortgage, as a receipt of Interest by the mortgagee, an adjustment of the account of the mortgage debt, improvements &c, petition for a foreclosure & the like happening within the twenty years— In further analogy to that Stat., in case of Infancy, years after ~~that~~ the party came of age is allowed for bringing the petition— the circumstance of absence
2d P. Wil. 287— 2d Atk. beyond sea, coverture &c is also allowed as exceptions
333 3d Do. same as under that Stat.; so too if the Stat. has begun
313— to run, a subsequent intervening disability does not stop it

Of Mortgages—

There is a certain species of mortgages called Welch mortgages which never become irredeemable— they are by their condition redeemable (say Michaelmas term next, or any succeeding michalmas term, so that the law day may never be past— After the time for the redemption of a Mortgage is past, the Mortgagee may ~~still~~ petition a Court of Chan. at any time that the Mortgagor shall redeem by a certain day or be forever foreclosed of any right of redemption in Equity as well as law— & when such a Decree is past. if the Mortgagor do not comply his equity of redemption is forever gone, but when an application of this kind is made the mortgagor is holden only to pay the debt specified in the Mortgage—

Upon the death of the Mortgagee the mortgaged premises descends nominally to the heir but really to the Exr., for tho' it wears the appearance of real estate it is in fact personal & like other personal property liable to simple contract debts— If the Mortgagee die before the law day & the Mortgagor would re invest himself with the title by payt. of the money, he must make the payt. to the Exr. but must apply to the heir for the reconveyance and all the suits for trespass &c upon the land, are brought in the name of the heir, but whatever he recovers in damages he holds only as a trustee for the ~~law~~ Exr. with whom he must account—

Of Mortgages

If a Mortgagee bequeaths all his personal estate by will, his mortgaged premises pass, unless it is clearly the intention of the testator that they should not – & under the name of real estate they do

2d Bm. 972. not pass unless the intention be clear that they should – If the terms of the Mortgage be ~~that~~ the redemption money be paid to the Mortgagee, his heirs or Executors, in this Case the money may be paid to the heir, if paid at the stipulated day, but yet the heir will be

2d Vern. 348. answerable over to the Executor – When the Mortgagee dies the land descends to the heir, & if he will pay down the Mortgage money to the Exr. may keep the land, but if not he is compellable to convey the land to the Exr., for the principle upon which it goes is that the money lent, or debt due, for which the Mortgage is the security was personal property, & therefore the security for should be considered in the same light – But if the Mortgagee alien the Mortgaged propy, the heir of such alienee is entitled to the redemption money & not the Executor, for the property was in the hands of his ancestor, not a pledge for the paymt. of a debt but by the purchase such ancestor meant to vest it in his property – the same is the Case with the heir of such person ~~[illegible]~~ as the Mortgagee devises the premises to, if it be evident from the terms of the devise that the devisor meant to pass a real estate –

If there be a joint tenancy of a Mortgage the principle of survivorship is not incident to it. All actions respecting mortgages must be in the name of the heir, & yet the Exr. is the real party. There seems to be no very good reason for this mode, but still it prevails in this State as well as in Eng. – When the heir forecloses the Equity of redemption, he may by paying to the Exr. the mortgage money, entitle himself to the land – otherwise it must be conveyed to the Exr. –

Foreclosure The Mortgagee can never have a decree of fore-

2 Vern. 365 closure untill the law day is past – If the Mortgagee dies his Executor regularly brings the bill for a foreclosure, but the heir's joining will not hurt it – & if the heir bring the bill without the Exr. & there be no exception taken, it will be well enough, tho' if excepted to, it is cause of abatement. – But when the Mortgagor is dead & a Petition of foreclosure is brought, it must be against the

3 P. Wi. 333 heir, tho' joining the Exr. would do no harm the rule of Equity & law differing in this respect –

If there be several Mortgages of the same lands & the prior Mortgagee would foreclose, he may bring his petition against as many such subsequent mortgagees as he chooses. as well as against the Mortgagor – & his decree will reach all such, & such only of the Mortgagees as he cites in – Infancy is no obstacle to proceeding in Chan. but 6 Months after the Infant comes of age is allowed him to demand a resolution

Of Mortgages

A foreclosure may at any time be opened on petition of the Mortgagor &c upon sufficient reason shewn: but reasons to be sufficient must be very strong— Among the reasons which influence an Eng. Court of Chan. to open a foreclosure is that of very great inequality

Barnard. 221. of value between the property mortgaged & the Debt— & in pursuance of this idea our Courts have taken a different method, which is to refuse to foreclose in case of any very considerable disparity between the debt & the value of the mortgaged property— this is peculiar to Conn.t

N.B. This peculiarity is now done away, & our Courts will foreclose however great the disparity

It is to be noted that tho' an Infant has 6 Mo.

3 P Wil 358 after coming of age to petition for a review of proceedings, a feme covert is not indulged a day. But yet if it appear that her husb. was guilty of any wrong conduct in suffering the decree to go against his wife, it may be revised upon her petition for that purpose —

A foreclosure will always be opened at the petition of a Creditor (who by the way could not be included in the petition of the Mortgagee for a foreclosure) provided the Cred.r previous to the foreclosure had offered to pay the mortgage debt to the Mortgagee, but not otherwise— It is a general rule that any dishonesty on the part of the mortgagee in procuring the foreclosure will be a sufficient cause for opening it— But a foreclosure will never be opened in favor of a mere volunteer as a devisee &c

Of Mortgages

If a prior Mortgagee foreclose as well the subsequent Mortgagees as the Mortgagor, & afterwards the land come by any means into the hands of the Mortgagor again, the lien which such subsequent Mortgagees had by means of their mortgage, revives again & attaches to the land in such Mortgagor's hands — If the Mortgagee foreclose & afterwards sue his Obligation, the Mortgagor is at his election either to plead the foreclosure in bar of the action or wave the plea & let judg^t. go against him on such Obligation by which the foreclosure is as effectually opened as by a decree — But when the mortgaged premises are inadequate to the paym^t. of the Debt & a foreclosure is had & then a suit brought on the Obligation, the mortgagor is estopped to plead such foreclosure in bar of the action; of course judg^t. must go upon the Obligation & the foreclosure be thereby opened — In Connec^t. however there has been one decision that a foreclosure of the mortgaged premises tho of far less value than the am^t. of the Debt is a sufficient bar to an after suit on the Obligation, sed quære.

1st Vol Root 202

Subsequent decisions to the same effect seem now to have settled this point at rest.

The Mortgagee, if it can be done without injury to others concerned, may wave his right of entry & foreclosure & petition to have the land sold & the avails applied to the discharge of his demand; & if they be insufficient the bond remains for the residue good, as in other cases of an unsecured demand. But this is never done when it will prejudice the right of Cred^rs. &c to redeem — & sometimes it is granted in best of

Of Mortgages -

A subsequent mortgagee may in many cases
get the preference to a prior one - as if the prior
mortgagee knowing that the subsequent one was
about to ~~take~~ lend his money upon a mortgage
of the same land without knowing of such
first mortgage, and does not inform him, such
prior mortgagee would be postponed; as if such
prior mortgagee hear the bargain or witness an
after mortgage & do not disclose the fact - But
if the 2d. mortgagee was in any way notified
by others of the existence of such previous mortgage
2. Atk 49 - he can not have the preference from the circum-
1. Vez. 61 - stance of such first mortgagee suppressing the
1. Bro. 357. fact - And if a bare neglect to inform will
be sufficient to give the 2d. Mortgagee the prefer-
-ence, a fortiori any industrious concealment of
such fact will, for that would amount to a fraud
And mere negligence to get the title deeds, in the
first mortgagee, without any fraudulent design
so that the Mortgagor was thereby enabled to decei-
-ve the second mortgagee in to a belief of the land
being clear has been considered as sufficient
3. P. Wil 280 - to postpone such first mortgagee to the second wh
1. Vez. 368 - contracted under such circumstances - But if a
first mortgagee should be interrogated about his
title without the person asking him about it let-
-ing him know of his intention to take a Mortgage
& such first mortgagee, supposing the enquiry to be
dictated by an idle curiosity should answer in such m

-ner as to lead the enquirer to suppose he had no claim upon the land, by which means he was induced to take a mortgage, yet the first mort-gage would not in such case be postponed— In Conn.t we have not much use for such law for our records (except in a few cases, such as not recording the deed &c) are a sufficient guard against imposition & it is the duty of every purchaser to examine for himself— Where there are several mortgagees he who has the legal ti-tle will hold the land, & ~~that~~ title will protect a subsequent mortgage against a prior one, as if there be three mortgagees of the same land, the first one has ~~the~~ legal title & upon the extinguishment of that, the second has the legal title, & so on— but if the last of the three mortgagees purchase in the title of the first he then has the legal title & may tack his puis-ne mortgage to such purchased title, & so have ~~it, tho~~ the third preferred to the second mortgage But in order to entitle such subsequent mort-gagee (the third in the case put) to tack his mortgage in the manner described so as to have it satisfi-
2d Vez. 573. ed before the prior or second mortgage, he must
Stra. 240 have taken such third mortgage without know-
2d Vent. 332. ledge at the time, of such second or prior mort-gage— The first mortgagee may tack to his legal title money afterwards lent, if secured ~~on the land~~ by matter of record as Stat. Merch.t &c which is a lien on land, tho' there be intervening mortgages provided such subsequ

advancement was made without knowledge of the intervening mortgages — then Stat. Merchant Stat. Staple & recognizances being matters of record tho' they give no title to the land, are liens upon it, & if prior in point of time bind the land even against mortgagees — So that a judg. Creditor as these are called, if prior in point of time to the first mortgage, may by strength of such lien protect a subsequent mortgage taken by him without knowledge of an intervening prior one, against such prior mortg. And a subsequent mortgagee may protect his mortgage & have it preferred to a prior one, by purchasing in a Stat. claim prior to such first mortgage, in the same manner as by purchasing in a previous Mortgage — But a prior Mortgagee by purchasing a subsequent Stat. or mortgage cannot tack it to his first mortgage so as to protect it against intervening mortgages —

A puisne mortgagee may protect his mortgage by purchasing the first mortgage tho' satisfied but the deeds not given up, for get the legal title how he will, if for no consideration, or it is said, even by fraud, it will protect the

Hard. 318 — puisne mortgage, taken without notice of the prior ones, against such prior ones — this is carrying the matter a great way — But in

1 P. Wil. 340 — such case, if such acquired title be in any way defective Chan. will not aid it —

When a subsequent claim is thus tacked the mean mortgagee must pay both sums if he will redeem — But if the Mortgagor himself would redeem he must pay not only such claims as may be lawfully tacked but all other legal claims of a nature to be comprized by the real security; unless it be upon the petition of the mortgagee to foreclose, in which case he need only pay the mortgage money — Neither upon such a petition will the subsequent mortgagee be obliged to pay such judgt. debts as might be legally tacked — An exception to the rule, protecting a subsequent mortgage by purchasing in a prior one, is that if that prior mortgage be purchased of a trustee & not of the equitable holder owner it will be of no avail in protecting the puisne mortgage; but so far good as to put the purchaser in the place of the trustee — A judgt. Creditor by purchasing in a first mortgage cannot tack his claim by Stat.
2d P. Wil. 491 — or recognizance to it as he might a mortgage — If the title of the first mortgagee be defective the second will hold tho' he knew of the first mortgage when he took his, for Chan. will not interfere in such case to aid the defect in the title of the first to prevent his losing his priority; but Chan. will aid such defective title against
3d Ba. ab. 644 — Salk. 449. all such as have no title but claim by way of lien upon the land as in case of judgt. Creditors &c — When there is a clause in the mortgage making it a security to all future sums which may be advanced: it differs

from common mortgages in this, that if the mortgagee Petitions for a foreclosure if the mortgagor will redeem he must pay all such after advanced sums, which is not the case in common mortgages - And if a second mortgagee will redeem such a Mortg. he must pay all such subsequent advancements provided he was apprised of the clause when he advanced his money on such 2.d Mortgage, but
7. Vin 52. if ignorant of such clause, the mortgage money only - Quere de hoc. for how should he know the amount of the after advances, & vide 4 Con. Rep. 150 - When there are sundry mortgagees & they have joined in a petition for the sale of the Mortgaged premises & obtained a decree for that purpose if the prime mortgagee should then buy in the legal estate, he would gain nothing by such step, for the avails of the sale must go to the several Mortgagees in order of priority, & if there be not
2 Vern 571. 3. atk. 809 enough to satisfy all, the latter mortgagee must lose his security - If the prior mortgagee petition for a foreclosure & calls in the subsequent mortgagees soon to foreclose them also, if it can be proved that any one of the persons interested had tendered to such
1. mortgagee his money before the foreclosure, it will not be a bar to the subsequent mortgagee if disposed afterwards to redeem - In many instances where notice in the law of Mortgages, is holden to affect the rights of the parties, constructive notice is allowed to be as operative as absolute - In this State where there are records, it is a general rule that he whose deed was first recorded shall hold, yet if a subsequent purchaser of Mortgagee knowing of the prior conveyance

but that it was not on record, take a convey-
-ance with the design of getting the title by first
~~getting~~ entering his deed for record. he shall be post-
-poned the priority of his record notwithstanding
Cow. 712 for the law looks upon this to be a fraud upon such
1st Vez. 62 - first purchaser — And if both the Grantees be honest
& the last one not knowing of the other conveyance
but be imposed upon by the knavery of the Grantor
& it so happen that the 2d. Grantee's Deed is first enter-
-ed for record; if it satisfactorily appear that the
first purchaser had been guilty of no negligence
in entering his deed for record. he will not lose
his title by such accidental previous entry
of the subsequent grantee's Deed — When a
Mortgagee goes into possession, he is allowed
nothing for his trouble of accounting unless he
2. Atk. employs a bailif, in which case such bailiff's rea-
518 - sonable wages would be an allowable charge
If the Mortgagee in possession assigns the
mortgage without the approbation of the Mortga-
-gor, still he must answer to the Mortgagor for
the rents & profits, if he elect to call upon him-
but the Mortgagor may if he choose call up-
3d. Bac. Ab. 658 - -on the assignee to account —

If a subsequent mortgagee will eject the Mortgag-
-or, his title is sufficient. tho' the prior Mortgagee
may by his superior title prevent, or oust him
after he has got into possession — If pending the
suit of the puisne mortgagee, the prior one brings his

Ejectment against the same mortgagor, the gives the mortgagor a right to fence, as it is called against the suit of the puisne mortgagee ~~& prevent~~ his recovery by pleading the suit of the prior Mortgagee. — If the prior Mortgagee eject the mortgagor & afterwards suffer him to continue in possession, such first mortgagee must account with the second Mortgagee upon his petition to redeem, for the rents & profits after the obtainment of such judgment in Eject^t, & can require only the bal. of his demand after the deduction of such rents & profits so suffered to be taken by the mortgagor; for by paying such bal. the 2^d mortgagee will be entitled to a decree to have the land relinquished to him — but in such case the first mortgagee loses nothing, for he may have a quantum meruit against such mortgagor for the time so suffered to remain in possession after judg^t in Eject^t — When the mortgagee has been in possession & assigned, & ye premises have pass^d thro' several hands — the Mortgagor when he petitions to redeem may if he choose call only on the Mortgagee for an account of the rents & profits & tender to him the surplus due, but in such case he will only lose his hold on the land, & recovers only the penalty for it is often out of the power of the mortgagee to procure a reconveyance; but if the mortgagor would pursue the land, he must by his bill bring all in whose hands the lands have been, into Court, the

Pre. C. 20 3. Bac. Ab. 658.

the Court may so frame a decree as to subject each one to bear his just proportion in accounting for the rents & profits – When the Mortgagor & Mortgagee disagree about accounting, the Master of the Rolls adjusts the account, & by
S. Bac. Abr. 659. that adjustment the other Mortgagees & Credrs. are bound
The mode of accounting is, to apply the rents & profits annually to the Interest of the Debt, & if they more than
P. Wm. 534 satisfy the Int. the surplus goes to sink the principal.
But all reasonable improvements are allowed to the Mortgagee & carry Interest from the time –
When the heir of the Mortgagor will redeem he may have aid of the personal property in the hands of the Exrs.; for the mortgage money being borrowed for the benefit of the personal property, that fund is
Vol. 449. the proper one from which to repay the loan; & that
J. Bro. P. 14. 520 will be decreed altho' younger Children should be unprovided for – Not only the heir but even the devisee shall in such Case have aid of the personalty to
1 P. Wms. 487. discharge the mortgage debt – But in neither case are the personal assets to be applied to the redemption of the mortgage so far as to prejudice the claims of Creditors & general legatees, but to the prejudice of the residuary legatee they may be – In Connecticut generally speaking the same persons are entitled to the real & personal property, this distinction therefore, as to what fund the redemption money is to be drawn from, is here, of little use, except in the few Cases in which by the Course of descent the real property goes to a different person from the personal – The rule that the heir shall have aid

of the personal estate in the redemption of mortgaged premises does not hold in favor of the heir of the alienee of the Mortgagor; for if the Mortgagor alien the mortgaged premises, the heir of such alienee stands upon different ground from the heir of the Mortgagor the personal fund of the alienee not being increased by the loan which was the cause of the mortgage

It is a settled point that the wife of the Mortgagee cannot be endowed — As to the wife of the Mortgagor it seems that while in possession she may be endowed if she will keep down one third part of the Interest, & it seems that in some cases when she has only the Equity of redemption she may redeem & hold dower & in other cases not — the distinction seems to be this, that if the mortgage be for a term of years only, she may redeem & be endowed, but not if the Mortgage be in fee. When the Mortgage in fee was made before coverture, the reason assigned for not allowing of dower is that the husb. was not seized during coverture — but when the Mortgage was made after marriage, no reason is assigned why dower is not allowable but it seems to be the Law — ~~& yet~~ It is Woodeson's opinion that the Wife of the Mortgagor is endowed generally of ~~such~~ the Equity of Redemption when the mortgage ~~is~~ was made during coverture, & says ~~that~~ those cases where it has been decided that she is not dowable of the Equity of Redemption is when the

1. Atk. 606
2. Do. 526
Prec. in Ch. 137 —

gage was made before coverture — The husb. of a feme Mortgagor may be tenant by the Curtesy of an Equity of redemption — but husb. of feme Mortgager cannot be tenant by the Courtesy of the premises mortgaged, they being considered as personal property. If a husband mortgage his Wife's land, (unless it be by fine or recovery in Eng. or in Cont. by joining in ye same Deed, it will be of no effect except to carry the usufruct during his life, or if he survive & be tenant by the Curtesy, during the existence of that right — Yet if after the husb.'s death, if the Wife assent to the conveyance previously made it becomes hers — When a wife joins by fine in a Mortgage of her lands to pay or secure her husb. debts, she upon his death will be in the place of a Creditor, postponed indeed to other Creditors, but preferred to legatees, & will be entitled to have aid of his personal estate for the redemption of the land — But if she joins in a Mortgage of her estate for the purpose of disencumbering the estate of her husb. of a prior Mortgage, she upon his death stands in the place of the Mortgagee & holds the estate so disencumbered, notwithstanding the Claims of Creditors untill it be redeemed, for she is as a purchaser in Equity of such disencumbered estate — When a Wife was a Mortgagee before marriage, the mortgage in her hands if not reduced into possession during coverture like other choses in action, survives to the wife — the

Cow. 201 1 Ves. 526

2 Wil. 264

2 Atk. 384

reduction to possession, may be by a bona fide alienation during coverture, but a mere colorable alienation will not do — But if the husb. settles a competent separate mainten-ance upon the wife before marriage, or even after, if in pursuance of articles made before coverture, it is considered as a purchase of the Wife's fortune, & in that case all her choses in action goes to the Exr. — But if the settlem-ent was after marriage & merely voluntary

2d Atk. 244. it is a nullity — It is a principle in law that a Creditor may indemnify himself out of any chose in action upon which he can get a legal hold; & so if a Creditor can get possession of the Wife's Mortgage during the husb's life time, Chan. will not take it away from him — And in Conn. it has been a question whether the Cred. may not levy his Exn. on such a Mortgage — When a husb. brings his bill against the Mortgagor of the Wife to redeem or be foreclosed, or to have the premises sold, or to have a legacy paid her, Chan. will not decree it untill the husb. makes a suitable settlement

1st P. Wil. 382. upon the wife —

If there be usury contained in a bond securing a Mortgage, both Bond & Mortgage are void at Law — but in Equity they only expunge the surplus above legal Interest & consider the contract valid for the residue —

Of Mortgages

If there be an agreement between the mortgagor & mortgagee that, if the terms of the contract be not complied with by such a particular specified day, the Interest shall be raised, it is in Chan. considered in the nature of a penalty, & will be relieved against, unless over & above the agreement there be a Covenant to pay the penalty, in which case Chan. will not interfere – But if the agreement be that if such a particular thing stipulated, be done by such a
3 Atk 520 certain day interest should be lessened, & the condition
Bur. 1374. be not complied with, no relief will be afforded –

If A. have a Mortgage for 100£ & there be 15£ interest in arrear, & he sell the Mortgage to B. for 115£ with the consent & approbation of the Mortgagor, he the Mortgagor, must pay B. interest upon the whole 115£; but if the sale be without his consent, he will be liable to pay Interest only on the orig.l sum –

When the accounts between the Mortgagor & Mortgagee are referred to a Master to settle, the statement can not be questioned by the parties, & upon such stated bal. Int. tho' it may be compound must be paid – this however is only as between mortgagor & Mortgagee, for 3d persons are not bound by such statement, neither indeed are Infants tho' immediate par-
L. Ray 25 – ties to the acc.t; not even so far as to pay Int. in the manner by such statement directed –

An agreement upon making a Mortgage, that, if the Interest be suffered to be in arrear, it should carry
Sal. 449 2 Atk. 331 – Interest, is void, & no more than Legal Interest recoverable upon such contract, but yet such a contract is not

usurious tho' a recovery cannot be had accord-ing to the terms of it, but for the simple Int. only. But this rule relates only to the orig.l bargain, if after Int. has run in arrear, the Mortgagor agrees to put it upon Int. — it is valid — If the title of the Mortgagor be impeached, the Mortgagee in possession is not obliged to defend it, but if he does he will be allowed for his expences incurred in such defence, when accounting

3. Atk. 518- with the Mortgagor &c. & for Int. upon the amd. of the expences — If there be tenant for life of the Mortgaged premises, & he will not keep down the Int., the reversioner may have a decree compelling him so to do — A tenant in tail

1st Vez. 477- of an equity of Redemption may bar the reversioner by fine or recovery; & while in possession is not bound to keep down the Int. — Tho' a tender at the time mentioned in the condition of the mortgage is sufficient to revest the title, & carries with it all the incidents of a tender in other cases; yet a tender after the forfeiture does not revest the title nor stop the Interest from the day of tender unless made after a six months notice, in which case Int. will stop tho' the title be not revested —

When Months are mentioned in any proceeding respecting Mortgages. callender, & not Lunar Months are to be understood, tho' the latter are generally considered as the legal Months —

Parol Evidence is sometimes admitted to alter the rate of Interest reserved in a Mortgage: but then it

always to lessen & never to enlarge the rate of Int. tho' it is admitted - The reason of this is probably that rule of law which admits of ones waving a legal advantage - The New York Stat. regulating Mortgages provides that the mortgaged estate of an absconding mortgagor may be sold by the Sheriff, & the surplus of the price, after paym.t of the mortgagee's claims ~~other debts~~, lodged in the Court of Chan. for the benefit of the Mortgagor - In cases of this kind, the Mortgagee in possession states his own account, there being no one to question it, but yet the Mortgagor tho' bound by the sale, has seven years to call the Mortgagee to account in, & may recover whatever is justly due him out of the avails of the sale if the Mortgagee's acc.t with the Sheriff was not accurate & just - All Mortgages must be recorded in the State of N. York & acknowledged before a Magistrate No defeasance will there be of force unless recorded & the first registered deed if made, bona fide, always holds the land - By the same stat. the mortgage may be so made as to authorize the mortgagee to sell ~~the land~~ the Mortgaged premises at auction past all redemption, & that, too without a decree of the Chancellor; but there must be an express clause empowering the Mortgagee to sell, in the Deed - And after all, this holds good only between the Mortgagor & Mortgagee, for if third persons are Interested, such sale is not admissible - the sale must be at public auction - & a Mortgagor under the age of twenty five years cannot give power of sale to the Mortgagee, by such clause in the Deed -

Bro. Pa. C. 580 -

Of Estates upon Condition

If an Estate be granted upon condition subsequent which is immoral, unlawful, physically impossible or repugnant to the nature of the Estate, the Estate vests absolutely & the condition is void— But if the grant be of an Estate to commence upon a precedent condition which is unlawful the grant is a nullity; for whether the condition be performed or not— no estate passes.

Between a condition & a limitation as it respects an estate there is this distinction viz. When an estate is granted determinable upon the happening of a certain contingency the estate notwithstanding the happening of the contingency remains in the grantee untill the grantor interferes to take advantage of the condition— & this is an estate strictly on condition— but if the terms of the grant be, upon the happening of the contingency that the estate shall go over to some third person in such grant designated, it is a limitation, & the estate of the grantee is gone the moment the contingency happens, & that without any act of the grantor— the interest being eo instanti, of the happening of the contingency vested in the person to whom the estate was limited by the terms of the grant——

Of Stat. Merch.ᵗ Stat. Staple &c

These estates are created by a voluntary acknowledgment of indebtedness before a Majestrate & this acknowledgement or recognizance is a judg.ᵗ upon record, upon which Execution may issue, & contrary to common practice in Eng. may be levied upon land & that put into possession of the Cred.ʳ, until his Debt be satisfied — An Elegit differs nothing in its nature & manner of being obtained from the foregoing but is leviable upon personal chattels, & upon one moiety of the land only, but this moiety is disposed of to the Creditor in the same way (viz) untill the debt be satisfied from the product of the land — Lands so extended are chattels real in estimation of law & not real Estate

Of Coparcenary —

Estates by Coparcenary are always created by descent from an Ancestor — & the tenants by Coparcenary are in Eng. the daughters, when there is no male heir — or in Gavelkind tenures the Sons — In Con.ᵗ, all the heirs both male & female are Coparceners untill partition made — for all those in equal inheritable degree make but one heir — & in disputes relative to their common interest they must all sue & be sued jointly — Of this there has been one decision to the contrary in Con.ᵗ — The entry & possession of one of these Coparceners

C.L. 164

is the entry & possession of all, & the Stat. of lim-
-tations will not run against the others when
one is in possession, except when one profess-
-ly holds adversarily against the others - but
it is some times difficult to determine what
is evidence of such adversary holding - When
one is held out by his fellow, he may have
his Eject.t to get into possession tho' not to
turn the other out - This coparcenary interest is dissolva-
-ble by Partition, which may be made either
by mutual consent or by compulsory pro-
-cess - When by consent it ought to be by deed
perhaps between the parties to the partition
a parol partition is such an one as a Court
of Chan. would order to be carried into effect
but this circumstance will not better the
matter as it respects third persons; but yet
the practice has got to be so general to make
partition in this manner, that possibly a
Court would now sanction it - When a writ of
partition issues in Eng. the Sheriff takes a
jury of twelve who make the partition & re-
-turn their doings to the Court for their accept.
In Conn. the Sheriff takes three men only who
make the partition & lodge their doings in the
Clerk's office, which is final without the appro-
-bation of the Court - If one of the Coparceners
die & leave only daughters, in Eng. they are Copar-
-ceners with their surviving aunts - No action for
or trespass lies for one parcener against another -

Of Jointenancy

Joint tenancy is created only by purchase - In Eng. when any thing is given to several without words indicative of the Grantor's intention that it shall be held in severalty or in common, it is a joint tenancy - this tenancy may be of any quantity of Interest, but that quantity must be the same in each, or it will not be a joint tenancy - there must also be a unity of time & of possession, as well as of Int. This species of tenancy is said to be favoured by the Eng. law, so that if an Estate be given to A. & B. jointly & severally, it is holden to be a joint estate & not a several one = All the incidents which belong to a Coparcenary belong also to a joint tenancy, as that the possession of one is the possession of all - that they must join & be joined in actions touching the jointure - Joint tenants may however have actions of Waste one against another which Coparceners can not - & both these species of tenants may have actions of acct. one against another - The Jus accrescendi makes the great difference between this & other kinds of estate - A joint tenancy may be severed in many ways as by alienation, or lease for life by one of the tenants, by mutual agreement & by compulsory process -

Of Tenancy in Common &c

A tenancy in common may exist without any of the unities essential to a joint tenancy, except that of possession - this estate is created many ways, & many of the incidents of a joint tenancy are common to it, - Tenants in common need not ~~by Eng. law~~ however, join in actions - & one cannot grant a lease without consent of the other. This tenancy may be severed either by agreement or by process of one against the others -

In one instance all these species of tenants (viz, Coparceners, tenants in Comm. & Joint tenants) may have actions of trespass one against another of their fellow tenants, provided the tenancy be of one entire thing, as a house, & one of the tenants demolish it an action by his fellow lies, for such trespass - In Connecticut the distinction between the three above mentioned species of Estates, is of little moment - for the principle of the jus accrescendi, is not known here - & the incidents of the several estates are here the same - the same actions which belong to the one, belong also to the other, & they may in all, be sued & be sued

quere. jointly or severally at the option of the suitors - In the State of New York, tho' joint tenancy is preserved with all its incidents, it is not favoured, & the grant which creates it must contain in express terms that it shall be a joint estate, or it shall be deemed to be an estate in Common -

Of Remainders &c –

A reversion is an estate which returns to the grantor after the expiration of the estate granted, which estate ~~was~~ must have been less than the estate of the grantor. There is always a reversionary interest in the grant-or, unless he gives over his whole estate to some remainder man ~~in fee~~ or remainder men, after the expiration of the particular estate granted – A reversion is liable for bond debts, & also to all such incidents as apper-tained to the estate before any thing was carved out of it by the grant – but in case of debt the judgt. is that Exon. be stayed untill the end of the term for which the estate was granted – But a reversion after an intailment is considered of no value, for it may be barred. A remainder does not depend upon the operation of law, but upon the act of the party, & cannot be created but by limitation upon an estate less than a fee simple – A remainder may be in fee or for a less term, & when for a less term than a fee there is a reversionary interest in the grantor. If the estate upon which a remainder is limited be defective or forfeited, or in any way destroyed, the remainder is gone – The remainder must be created at the same time with the particu-lar estate, & must vest either during the particu-lar estate or in instanti of its determination – In all vested remainders it is invariably fixed in whom it is to vest — A contingent remainder in fee can be limited only on a freehold estate – for it is always necessary in the creation of a remainder in fee, or any other estate in fee, that either the fee, or a freehold

less than a fee should pass out of the grant at the time of the grant — & the estate being for a term of years, & the remainder man uncertain, or the event upon which he is entitled uncertain, livery cannot be made to the lessee atty for the remainder man upon such uncertainty — Instances of a contingent remainder — I give an estate to A. remainder to the eldest son of B. yet unborn — But the contingency must not be remote, but within a common possibility — so an estate to A. for life remainder to the heir of B. may do — for B. may die in the life time of A. & so have an heir to take — But an estate to A. for life, remainder to the heir of B.'s eldest son, B. being alive, is too remote. Not only an uncertainty of the person in whom the remainder is to vest, but uncertainty of other events when the person is certain will make the remainder contingent — as if to A. for life, remainder to B. on the day of his marriage — An estate to A. for years, remainder to B.'s eldest son will not do — ~~being~~ — an Estate to A. for life, remainder to B. & his heirs in trust for A. during A.'s life, remainder in fee to his heirs is good & common to prevent the Estate's falling in upon the surrender & forfeiture of A. — ~~Certain~~ Remainders created by Devise of a contingent nature are called Executory devises — & here the maxim that a freehold cannot commence in futuro is broken over; for a devise to A. when he shall marry is good without an intervening estate to s[upport] it

So too a remainder may be limited by devise upon a fee simple, as in this case — an Estate devised to A. & his heirs forever if he come of age, but if not then to B. & his heirs is good — These contingencies may be limited to ever so many persons then living, but must happen during the life time of a person in esse, or at least within twenty one years after as it may happen — as if an estate be granted to the eldest son of a feme covert, then unborn, when he shall come of age, if the feme die in labor with such first son, the estate may be in waiting untill he come to the age of twenty one years — this is the greatest extent to which it has ever been carried — By deed one cannot out of an estate for years, carve out a life estate with a remainder, which remainder will be good — but by Devise this may be done — But even by Devise one can not give to A. for years, remainder to the eldest son of B., unless that son be in esse at the time of the grant — In Connecticutt there is a Stat. which adopts the Eng. law of Executory devises & renders it applicable to conveyances by deed as well as by will — there is only one difference which is this. in Conn. an estate can go no further than to the immediate heir of one in being, as to A. for life, remainder to the eldest son of B. then unborn, whereas by the Eng. law an estate may by executory devise be limited to A. for life, remainder to the son of B's eldest son then not in esse, provided that grand son should be born before the death of A. — So that in Conn. we have nothing to do with the maxim that a freehold can not commence in futuro nor with the intricacy attending the disposition of a contingent remainder by deed

Of Descents of Real Estate - Eng. Cannons

When an heir is spoken of in treating of Descents the heir of the person last actually seized is always meant & not the heir of one who may have a right to be seized — The rules, or Cannons of inheritance as they are usually called, are

I.st The Eldest son takes the whole real estate in exclusion of the other brothers & sisters; & this rule reaches to the representatives of such heir however remote, for his Infant grand daughter would take in exclusion of all his brothers & sisters - & among representatives the same rule of preferring the eldest male obtains for among males there can be but one heir —

II. If the Eldest son die without issue the next son & his representatives takes the whole. - —

III. When there are no males then the Daughters shall have the Estate equally as Coparceners, & if one of the Daughters die leaving issue that issue takes the part of their Mother in Coparcenary with the surviving Sisters: this Issue in succeeding to their mother's part, observe the same rules of preference as in other cases. There is no such thing as Representatives inheriting per capita, but always, per stirpes —

IV. When there are no lineal Descendants the rule is that the estate shall never lineally ascend, & if it gets to a lineal ancestor it must be by inheriting to a collateral relation —

V.th On failure of Issue the estate goes to collaterals, the kindred of the deceased, & of the Blood of-

the person from whom the estate came, or as it is termed, of the Blood of the first ~~purchaser~~ ~~for when~~ an estate is known actually to desce -nd from one line of ancestors, none but those of that line can inherit - as if the land descended from the mother's side, the relations on the part of the father could never inherit & vice versa: or if it was known to come from the Grandmother of the Mother's side, her relations only can inhe -rit, & if they be extinct the estate will escheat - But in order to prevent new purchased Estates from escheating upon the default of issue, which would happen in all cases of this kind (the expression of the Blood always being understood in the feudal sense) a fiction of law steps in & makes all these new purchased estates, to be considered as feudes of indef -finite antiquity - so that now, no new purchased lands are considered as such, but every feudum novum, is now held ut feudum antiquum —

VI. No one can inherit unless he be of the whole Blood for a twentieth Cousin ~~of the whole~~ shall inherit in preference to a Brother of the half blood - & indeed the land will escheat rather than to descend to a brother of the half blood —

VII. In search of an heir the Male stock is to be pre -ferred to the female, subject to the restrictions in the 5th -rule: for when the land is in fact a feud of indeffinite antiquity, or by fiction of Law is holden so to be, in default of Brothers & Sisters & their Nep

representatives, resort must be had to the grandfather of the father's side, then to the issue of the Paternal grandfather's father, then to that of his grandfather, & so on in infinitum in the paternal Grandfather's paternal line: on failure of this line, then trace the paternal grandfather's maternal line in like manner. Next ascend in the paternal Grandmother's paternal line in infinitum, & when that fails trace the paternal Grandmother's maternal line. When all these fail, then the relations on the Mother's side are entitled & first the issue of the Maternal grandfather are sought, & in default of them pursue the maternal Grandfather's paternal line in infinitum, then the Maternal Grandfather's maternal line, then the Maternal Grandmother's paternal line, & lastly the maternal grandmother's maternal line, & if an heir is found in none of these eight ascending lines then the land will escheat.

Of the Course of personal Estate. Eng. L.

The Stat. of Char. 2d, that the distribution of personal estate, where there is no will, shall be one third to the Widow, or if there be no Children a Moiety; the remainder to the Children of the Deceased & their Legal representatives, in equal portions, & in default of lineal descendants to the next of kin & their legal representatives. To discover who is next of kin the computation is

Of Distribution of Personal Estate –

the rules of the Civil law is followed – Among lineals representation extends ad infinitum, but among collaterals it, by construction, extends no further than to brothers & sisters Children – Among lineals those in the descending line are preferred to those in the ascending line of equal degree – When any of the old stock are living the Children of those who are dead take by representation, & whenever they take by representation, they take per stirpes; but when all the old stock are gone they take no longer ~~but~~ by representation but in their owne right being all in equal degree of kindred, & in such case they take per capita – Those of the half blood take equally with those of the whole – It has been determined that the Grandfather shall be postponed to the Brother tho in equal degree – And by the Stat. of Jas. 2. the Mother is placed on the same footing with a brother & shares equally with him tho nearer of kin – The authorities illustrative of the foregoing principles are Sal. 296. 1st Vent. 316 & 23. 1st Vez. 333 Pits Case in 1st of P. Wil., Bowens Case. 3. P Wil. 50, 2d Vez. 213 – 1st Atk. 454 – Sal. 251 – 1st Atk. 458 –

Examples of Distributions under the Stat. of Car. 2 – 1st J. S. is dead leaving four Children Tom, Dick, Susan & Sally, the personalty goes to them in equal shares –

Distributions by Stat. of Car. —

2d. Case — Same case only Tom is dead leaving Fred. & Polly — Fred. & Polly take what Tom would have

3d. Tom. Dick. Susan & Sally are dead. Tom left Fred. & Polly. Dick left Ned. Sally left Nancy & John & Susan left Alfred. Henry & Fanny — Fred. Pol. Ned &c take in equal proportions per capita —

4th the Case the same only Fred. is dead leaving Betsy Betsy takes Fred^ks part ——

5th. J. S. left no Children but three brothers Jo. Sam & Moses — they share equally —

6th. Same Case only Jo. is dead leaving A & B. they take Jo.'s part —— ——

7th. Jo. Sam & Moses are dead Jo. left A & B. Sam C. & Moses D. E. & F. — A. B. C. D. E & F. take equally —

8th. J. S. left brothers as in the fifth Case & his father Reuben — Reuben takes all in exclusion of ye brothers

9th. J. S. left brothers as before & his Mother Mary — Mary shares equally with the brothers —

10th. J. S. left Nephews & Nieces as in the 7th Case & his Grandfather Solomon — Solomon takes all

11th. J. S. left Nephews & Nieces as before & his great grandfather Adam — Adam shares equally with each Nephew & niece —

12th. J. S. left Nephews & Nieces as before & his uncles George & Edmond — Geo. & Edd. share equally with the Nephews & nieces —

13th. J. S. left brothers as in Case 6th & brothers Children & his uncles Geo. & Edd. — Geo. & Edd. have no share —

Cont.d Stat. of Distributions —

In all cases where there are lineal descendants i.e. Children or their legal representatives the mode of distribution both of Real & personal estate under our Stat. is the same with that followed under the Stat. of Car. for the distribution of personal propy— But when there are no lineal descendants it is different — & a distinction obtains between what is termed ancestral Estate, i.e. real Estate which comes by descent, devise or Deed of gift from the Parent, ancestor, or other kindred, & that which is of the earnings of the deceased, or given to him by one who was not of kin — The Estate of the former description goes (according to the words of the Stat.) to the brothers & sisters of the intestate & those who legally represent them, of the blood of the person or ancestor from whom such estate came or descended; & in case there be no such brother or sister nor legal representative as aforesaid, then such real estate derived as aforesaid, shall be & remain to the next of kin to & of the blood [or as it ought to be to make sense, to the next of kin of the blood of the ancestor &c. excluding the words "to & of"] of the ancestor or person from whom such estate is derived as aforesaid — Here it evidently appears that the Legislature have used the phrase, "of the blood," different from the ~~feudal~~ feudal sense, which is the sense adopted in the books: for in the feudal sense, of the blood, always means a lineal descendant from the person mentioned — but that

can not be the meaning of the Stat., for it limits the estate expressly to the brothers & sisters of the deceased & their legal representatives, of the blood of the ancestor — but if the case were that the deceased received the estate from an uncle, the brothers & sisters to whom it is limited, tho' of kin are not of the blood of the uncle, & therefore accord-ing to that deffinition, no one could take — so that it is evident of the blood means no more than of kin — Upon default of brothers & sisters &c of the blood &c the Stat. says the estate shall go to the next of kin "to & of the blood" of such ancestor &c, the grammatical construction of this is, to the blood & of the blood which is the same thing, & so can mean nothing more than, of the blood of the ancestor &c. or in other words, to the next of kin to the deceased of the relation of the person from ~~whom~~ it came. The being of the half or of the whole blood makes no difference, provided that half brother be of the blood of the orig. donor; but if the half brother be not of the blood ~~&~~ (kin) of the donor he can take nothing. But that part of the real estate which came by gift from one not of kin to the deceased, or was the fruit of his own earnings, together with all the personalty, is by the Stat. given, in default of ~~Children~~ & their legal representatives, to the broth-ers & sisters ~~& sisters~~ of the whole blood & such as legally represent them, & if there be no such kindred then to the parent or parents of the intestate,

& if there be no ~~parents such kindred~~, parents then equally to every of the Bretheren & Sisters of the half blood & (as it ought to read) their legal representatives, & in default of these to the next of kin — but as the Stat. stands, it reads — to the brothers & sisters of the half blood, ~~& those~~ but if there be no parents ~~&~~ nor brothers &c then to the next of kin & their legal representatives — But this construction would be inconsistent & absurd — for if there be two brothers of the half blood John & Henry & John be dead leaving A. — A. could take nothing & Henry would take all; but if Henry be dead also leaving B. — A & B. would both take as next of kin — but if A. be dead leaving Ben. according to the words of the Stat. Ben. would share with B. by representation — so that tho John's offspring in the first case would be excluded from a share, they would in the 2.^d & 3.^d be restored. But what is worse than all, the Stat. expressly says that representation among collaterals shall reach no further than brothers & sisters Children, which is the case in the last example & must be in every one which can occur under the exceptionable clause "the next of kin & their legal representatives" — for the Stat. expressly points out to whom the estate shall go 'till it gets to brothers & sisters Children, i.e. brothers & sisters of the intestate who alone are meant by the clause, "brothers & sisters Children". — beyond which representation is not allowed —

Of the Con.^d Stat. of Distributions –

In distributions under our Stat. the proximity of kindred, as under the Stat. of Car. is computed according to the rules of the Civil law, only evincing to take the express directions of the Stat. where that has preferred those who are more remote or postponed those who are nearer of kin – The doctrine of representation as recounted by the decisions under the Stat. of Car. it is presumed are also applicable to distributions under our Stat – for examples of distributions in all the various ways in which our Stat. may be construed. vide. Mr Reeves printed Essay on Descents.

N.B. In October 1803 an amendatory Stat. passed which alters the provisions of the Stat: relative to ancestral estates, which quiets the doubt respecting the meaning of this expression "to & of the blood" – giving the estate upon default of brothers & sisters of the intestate & their legal representatives, equally to the Children & those who legally represent them, of such person or ancestor, & in default of such Children &c. to the brethren & sisters of such ancestor, & if there be none such. then such ancestral estate is to be distributed in the same manner as any other property – The new Stat. however preserves the same mistake relative to the misplacing the words "legal representatives, after the words brethren & sisters of the half blood, as in the former

Of the Stat. of Distributions of N. York

When there are lineal descendants the real Estate goes as in the State of Conn. to the Children & their legal representatives – But when there are no lineal descendants, the father if living is entitled to the Estate, unless it come from the part of the mother of the intestate, in which case it goes as if the father were dead, to the brothers & sisters both of the whole & half blood & their legal representatives – Unless the estate was ancestrial i.e. coming by descent, devise or deed of gift from some ancestor, in which case those of the half blood & not of the blood of such ancestor cannot inherit – After the death of the brothers & sisters, & their issue take per stirpes & not per capita; & in all other cases not provided for by the Stat., the descent is as at Common law – Note – When the Estate comes from the Mother, not only the father but all lineal ascendants are excluded as at com. law, unless the estate come by collateral descent to them. The Mother in no case can inherit –

Personal estate is in N. York distributed in all cases according to the Statutes of Charles & James ——

Of Estates by Purchase

All the ways, by which an Estate can be acquir-ed, except by by descent, are termed purchase. Upon the death of the Ancestor, an estate which comes by descent, can go only to those relatives of the de-ceased who are of the Blood of the first purchaser; but all purchased estates of every kind are held as a feudum antiquum, & so will go to any kindred of the deceased of whatever line, observing the rules of descent in cases of feuds of indeffinite antiquity. In this State Ancestral estates, viz. those which come by descent, devise or deed of gift from any of the relatives of the intestate, can go only to such as are of kin to such Ancestor from whom the estate came (except by our new Stat. which provides that when there be no brothers lineal descendants nor brothers or sisters of the intestate nor Children, nor brothers or sisters, of such ancestor, nor representatives of any such brothers nor sisters & nor Children, that then the estate shall be distributed like any other estate) But all other real as well as all person-al estate may go to any relations of the intestate. By the Com. Law none but such as took by de-cent were liable for the Covenants of the Ance-tor binding his heir, or for any debts chargable upon the realty, unless the Covenant was specifically made to run with the land; but the Stat. of Wil. 3 make

Of Estates by purchase & of Escheats—

the Devisee as well as the heir, liable for the debts of the deceased chargable upon the realty, tho' not for covenants to repair, nor perhaps any other obligations except for Debt— It is always, however to be understood, that the heir is no farther liable for the covenants of his Ancestor than he rec.d assets—

Of Escheats—

When lands escheat, it in Eng. goes to the mean lord if any— if none then to the king— In Con.t it goes to the State & the Legislature have power to give a title— Not only does lands escheat upon the entire failure of issue in the usual way, but if the only issue be a Monster, a bastard, one attainted of felony or treason, or be a popish recusant, the land escheats— The law in Con.t is different as it respects the three last mentioned disabilities— By the Eng. law Aliens can not inherit nor even hold lands by purchase— In this country the law respecting aliens has never been settled, probably it will be differently determined, from what it is in Eng.— It was settled by the treaty of peace between this Country & Great Britain, ~~that, the~~ claimants in the respective Countries should be secured in the possession of the lands which they then held in the other; but whether the treaty is to be so interpreted as to secure the heir in the descent of the prop.y is doubtful— Upon the disolution of a Corporation the lands belonging to it will revert to the donor & his heirs if any, & not escheat

Of Devises —

It seems that wills were common among the Saxons before the Norman Conquest — But by the introduction of fiefs under the Norman Princes not only the Custom of alienation by Devise, but by any means, was abolished — & it was not untill the 32d. Year of Hen. 8th that the right of devising real property was restored; & by that Stat. the right was but partial — Previously to this time however, & after the passing of the Stat. of quia emptores which gave permission to sell lands, the law against devises was often evaded, by an invention of the Clergy of conveying estates to uses, which Chancery would enforce according to the intention of the parties & then devising those uses which was not prohibited — for uses were not considered as real Estate which alone was the subject of the prohibition & the fee of the land was at law in the trustee — To avoid these difficulties the Stat. of the 27th of Hen. 8th transferred all uses into possession — a new evasion was however soon discovered, which was only to carry the conveyance one step further, as tho' A. makes a conveyance to ~~the use of~~ B. for the use of C. in trust for D. — for the Stat. only transferring the possession from B. to C. he (C.) will be compelled in Chan. to perform the trust to D. — & such conveyance has been adjudged out of the Stat. of uses — But while this lame mode of devising was thus clogged by the Stat. of uses, the taste of the times for this mode of disposition became irresistible & par-

Of Devises

birth to the Stat. of the 32^d of Hen. 8th which gave
liberty to devise all socage lands, & two thirds of those
lands which were held by knight service — And the
Stat. of the 12th of Car. 2^d by turning all lands (except
Copy hold lands) into socage tenures, threw open
the door for devising all fee simple estates —
The Stat. of the 34th of Hen. 8th was made in explanation
of that of the 32^d of that prince — this Stat. points out
not only what may be devised but who may devise —
The subject matter of Devises according to the Stat.
is all lands tenements & hereditaments in fee sim-
-ple except such as were holden in joint tenancy —
All persons says the Stat. not legally incapable,
possessing such lands may devise them — This Clause
of the Stat. "having &c" has given room for litigation,
& one question was whether a possible interest could
be devised without its being in actual possession, rem-
1 Blac. 2. 222. 2. 58. Lev. 127. cont. ainder or reversion — this point has finally been
determined in the affirmative — An other question
arose respecting estates per auter vie, these were by the
Stat. Car. 2^d made devisable, they are also so in N. York by Stat.
But an estate to A. & his heirs for the life of B. is not
devisable, for the heirs in this Case take as purchasers
& not by descent, so that the term heirs in this
2^d Atk. 376. place is used differently from its common legal accep-
3. 375. tation, which is only to designate the quantity of Estate
P. Wil. 264. & is not used as a word of purchase — When one makes
over his land to another with a right of reentry reserved
1 Vez. 422. upon the performance of a certain condition, such right
of reentry is not a devisable property —

Of Devises —

By special custom the lands in Kent were always devisable, & it appears by determinations antecedent to the Stat. of Car. that where that ~~Stat.~~ custom prevailed estates per auter vie might be devised — If so it was a remnant of the common law, as all those ~~Stats~~ customs are, & of course it seems such estates are devisable in Conn.^d —

Where a Devise of real Estate is made it is not essential to its validity that it should contain an appointment of an Executor; for the Devisee takes immediately under the devise without the intervention of an Ex.^r, or any proof of the Will before the Ordinary — the Case is the same in Conn.^t, except when there is a deficiency of assets in the hands of of the Ex.^r or Adm.^r to pay the Debts, in which Case, such Ex.^r &c may sell lands under the Orders of the Probate to sufficient amount to make up such deficiency —

Any writing made with a view to the disposition of a man's estate after his death, is a will

1.^t Mod. 117 — whatever be its form — But such writing to take effect as a Will must be executed according to the forms by the Stat. prescribed. If an instrument of conveyance be to take effect in the life time of the maker, it is not a Will, however executed, but a Deed, & most commonly when so made, a voluntary conveyance which in the event of the failure of assets, is void as against Creditors; but neither the Court of Probate nor the Court

has any thing to do with such lands: but according to the Eng. mode, the Cred.^r has his remedy against such volunteer in an action against him as Ex.^r in his own wrong - ~~our mode~~ is for the Cred.^r to petition in Chan. to have such lands sold for the pay.^t of debts - But when the writing is to take place not untill after the testator's death, it is, if duly executed, a will or devise & vests the Devisee with the absolute prop.^y in the lands, liable however in this State like all the rest of the testator's prop.^y, to be sold for the pay.^t of debts on failure of personal assets: but if unduly executed: it is a nullity, & then the deceased, quoad the realty (the subject of the regulations of the Stat. 29.th Car.) is dead

3. 1. Bur. 548 - intestate — A will may be made at different times, & by several different memoranda - One possessed of several real Estates, may devise them by several devises: so too, he may make several devises of different interests in one & the same estate; as if after the devise of a certain estate to a son, a subsequent devise gives a life estate in the same land to a Wife, this not being incompatible with the bequest to

2. Ch. 721 1. Vez. 189 - the Son, but only a suspension of his right - both wills will stand - A Will may be good tho' the quantity or kind of property bequeathed be uncertain, depending upon the appointments

of some other writing to which the will refers, either then in existence, or to be made afterwards — as for example one gives by
Cro. J. 144 — will all his money in A. to B. except what
1 P. Wil. 530 — he shall hereafter engage by Bond to pay to C.

A Codicil is an appendage to a will, made to go with it, & not to revoke it in toto, tho' it may alter it essentially in its parts, so far as it particularly specifies; or is repugnant to the bequests of the Will — When such Instrument is by the testator called a Codicil, it is always proof that such was the intention of the testator, that it should be considered as a Codicil & not, as an independent subsequent Will — When a Will regularly made refers to other writings, it makes those writings whether
2 Atk. 368 — executed according to the Stat. of frauds or not, part & parcel of the Will — Wills when made abroad
2 P. Wil 291 — must conform to the laws respecting Devises where the property lies — The lex loci does not govern in the same manner in all personal contracts for if the rules of the Country where the Contract is made is observed, it will be carried into execution unless the object of the contract be immoral, or in derogation of the public rights of the Country where to be executed, as to defraud the revenue &c. In Eng. it is not uncommon for one to give by will or otherwise, power to another, to devise his

And upon this it was a question whether, if the first will was duly executed according to the Stat. it was requisite, that such second one must also be made in conformity to the Stat. but the decisions have been, that it must be so made — If a pecuniary legacy be given by Will charged on land, it has been determined that it was as land, & that all the requisites of the Stat. must be complied with — But yet when there is a good Devise of land charging it with all legacies & a subsequent will without 3 Witnesses giving legacies such subsequent legacies are by the implied reference to the 1st. will, charged upon the lands — [If] him a power is given by will to Ex. to sell lands for the paym.t of debts, the same formalities are necessary as in other cases of devising lands — The requisites of the Stat. of Car. of Conn.t & of New York are the same — The will must be written, it must be signed by the testator, or some one by him authorized; it must be attested by three witnesses, who must subscribe in the testator's presence — It has been determined that the testator's name in his own hand writing upon any part of the will, is a sufficient signing within the Stat. — & yet it has been decided that if it evidently appears that the testator meant to sign the will formally, but did not, the circumstance of his names appearing on the will will not be sufficient — It has in one case been decided that sealing was a sufficient signing; But that doctrine has since been denied — The Witnesses who subscribe to a Will are supposed to attest to the sanity of the testa-

Margin references: 1. P. Wil. 704 — 2. Atk. 268. 285 — 368 — 2. Vez. 173. — 3. Lev. 1. 3. Mod. 219 — Doug. 241 — Stra. 764 — 1. Wils. 313 —

8 P. Wil. 96 – tor at the time of ~~makes~~ executing the will & strong evidence is requisite to establish the contrary. It has been doubted whether a Subscribing Witness may be allowed to disprove the sanity of the testator after having by his subscription as a witness to the will, attested to his sanity – but it has been allowed of – It is not an absolute requisite that the testator subscribe his name in the presence of the Witnesses. for an acknow-

2d Vez. 445 – ledgment of his hand to them is sufficient but this acknowledgment ought ~~ought~~ to be explicit for his saying merely, "this is my will" or the like, leaves it doubtful upon the authorities whether it be sufficient – in the Case of Ld. Bolin-

Comy. 197. brooks will it was, however, held, sufficient – the Jury finding ~~found~~ the will well executed. The whole will must be present, at least it must be in the same room at the time of the attestation of the Witnesses – In a case where the three Witnesses signed each a seperate Sheet of the will, it all being present, but no

3d Bur. 1775 one of them all the Sheets, it was held to be a sufficient attestation – It is necessary that the witnesses subscribe in the presence

Car. 81. Sal. 395. Bro. C. 99. of the testator – that is, it must be within the possible view of the testator – ~~It~~ yet tho' in the possible view of the testator, if done clandestine-

1 P. Wil. 740. ly the will is void – If the witnesses dont subscribe in the possible view of the testator ~~it~~ the will

1 P. Wil. 299 is void, altho' the witnesses retired at the testator's own request — The testator must be compos mentis at the time of the attestation or it will be of no avail, tho' in his corporal pre-
Doug. 241 -sence — Mere proof of the subscription of the witnesses, is not in itself proof that it was sub-scribed in the presence of the testator, but that fact is to be ascertained by the oral testimony of the witnesses, if alive — but if dead, it being in the power of the devisee to prove nothing but their hands writing (unless there were others present) it will be deemed sufficient evidence of a due execution to prove their hands writing, unless the contrary be
Cha. 1100. shewn — "There must be three Witnesses"
Upon this clause it has been determined, that if there be a will with only two witnesses, & a Codicil recognizing the will with two, one of which was also a witness to the will, yet neither the will nor Codicil were duly executed for passing
Car. 35 lands — And even the due execution of a Codicil annexed to a will not properly executed will not help the deficiency of the will — but if the codicil be upon the same sheet of paper & it be duly
9 Brn. 1775 executed & appear to be designed as an execution of the will too, it may be so considered — But a Will may be made at different times and on

different sheets of paper not tacked together yet if they were all designed but for one will (& not as a Will & codicils,) & the last sh[ould] be duly executed it will give validity to the former parts, it all being considered as but one.

2d Atk. 177- It is not a requisite that the witnesses sig[n] in each others presence, or attest the will at the same time, for the will may be at-tested by them & published in their hearing of each seperately at different & even distant perio[ds] of time- A Witness to a will must be such a one as can be sworn upon the proof, that is, that

Ld Ray. 556- he be not so far interested, as to be inadmissible for if he become infamous after attestation, his ha[nd] may be proved= It has been, & when the Stat[ute] does not settle the point, still is a great dispu[te] whether a witness who by reason of Int.- was not credible, can by any matter expost facto become a proper witness- that is, whether the in[ter]-

2d Stra. 1253- 1. Bur. 414- estedness at the time of attestation is to be the criterion- & upon this subject the Eng. autho[ri]-ties may be said to be balanced- The Stat. 25th Geo 2d. ordains that all legacies given to the subscribing Witnesses shall be void & they ad-mitted to testify; & that all Creditors whose d[ebts] are by the will charged on Land shall neverthe-less be deemed credible subscribing witnesses-

In the State of New york the Stat. is the same but in Conn.t no provision of the kind has been made: & the decisions both of the Court of Errors & Supr. Court have been contradictory, but the last decision in the Court of Errors was in favor of the doctrine, that interested ness at the time of attestation could not be purged by release or other matter ex post facto. [N.B. this last was a late decision made since these lectures were given]

A legatee when a subscribing witness may be called to testify against a will, for he swears against

Sel 691- his own interest - & if his Int. be balanced, as if he have the same legacy by both wills there being two, he is a good witness, for let which will stand he gets the same —

A will must be published in some way or other, tho' the Stat. is silent upon this head - Some

3. atk 156 thing more than barely making the will must be in proof, but no particular mode of publish-ing is required, & it seems that a very small

8. vin. 125 matter will do - In Conn.t there has been no decision as to this point; & it appears not unreas-onable to conclude that proof of the Execution of the Will should be considered as sufficient. but perhaps it would not be so holden —

1 Vin. Devise. All persons not legally incapable may make wills: those who are incapable are Idiots, lunatics, Such as were born deaf, dumb & blind, Infants, & by Stat. of Hen 8th femes covert, In the State of N. York a similar Stat. disqualifies femes covert

Of Devises -

But whether coverture is a common law disabi-
-lity is a disputed point, & we having no Stat. upon
the Subject in Conn^t. the Court of Errors has in
one case decided, that a feme covert may devise
real propy without the concurrence of the husband.
In Eng. a feme covert who has both real & perso-
-nal estate to her own seperate use, may
dispose by will of the latter but not of the former
but she may execute a power of disposing of real
estate by a Will, or an appointment in nature of
a will, in consequence of a power reserved to her
by articles made previous to marriage, or by
fine or recovery after marriage the husb. consenting
or by the Donor's reserving by the terms of his gift
to the feme, the land to her sole & seperate use
with, power to appoint by an Instrument in
nature of a Will, to whom the estate should go
her coverture notwithstanding, should she become
covert of baron - but such disposition of the
feme takes it effect from the original grant
& not from the will of the feme merely: & yet it
is necessary that such will of the feme should
be executed according to the directions of the Stat.
& before the feme can make such appointment
she must have arrived at the age of twenty one.
A Devise made under duress is void, so is one
made under the influence of very great importunity
when in a low & weak state -

Of Devises -

If the testator labor under any incapacity at the time of making a Will, as being under age, under coverture or the like, the removal of that impediment, afterwards, as coming of age, being discovert &c. does not give validity to the will. [1 Sid. 167] for if void at its inception a will can by no mat- [Plow. 343] [Sal. 238.] -ter ex post facto, be rendered valid - & if a joint tenant make a devise of his joint propy & afterwards sever the jointure, still the devise is void, the propy not being devisable at the making of the will -

Such lands only as the devisor was in possession of at the time of the devise will pass by it - & as to after purchased lands he will be considered as dying intestate; unless he, after such purchase republish his will, in which case such after purcha- -sed lands will pass, if the expressions of the will be comprehensive enough to carry them - But without such republication they will not pass altho' the will take particular notice of them as being lands which the testator intended to purchase or the will be explicitly of all after purchased lands -

N.B. If one by deed grant to J. S. Blackacre which he did not then own, but afterwards purchases, the grantee gains by such grant no title to Blackacre as against third persons or subsequent bona fide purchasers who were ignorant of the transaction; but as between the grantor & grantee such conveyance is valid, for neither the grantor nor anyone under him as heir can question the covenants of the deed, or in any way eject the grantee

Of Devises

It seems not perfectly clear from the Eng. auth-
-orities whether an actual seizin at the time
of ~~the result of~~ ~~making~~ the devise, (~~he having devised the estate while in possession~~) be requisite or not — [they being a right of posses...] but in Con[n.]
it is clearly immaterial, if at the time the tes-
-tor had a right of seizin; for a right of possess[ion]
is here deemed the same as possession —
Personal estate acquired after making the
will as well as before pass by it; i.e. such
as remain at the death of the testator —
It has been determined in Chan. that an
equitable estate is the proper subject of a devi[se]
& it is a settled rule that any real estate ~~w~~
articled for by the testator previous to making
the will, will pass by such will, even if by
the terms of the Contract, the conveyance wa[s]
9 Mod. 78 — not to be made untill a period which wa[s]
2 P. Wil. 631 — after the time of making the will; provided such
1 Vez. 492 — contract would be inforced in Equity — & it seem[s]
1 Vez. 432 ~~that~~ such equitable interest will pass und[er]
a sweeping clause of all my real estate &c.
2 P. Wil. 629 — But lands articled for after making the devise
are as after purchased lands & do not pass.
The Chan. however in one Case says that if a testa[tor]
2 Ch. Ca. 144 — Devise all after purchased lands for the pay.t of deb[ts]
the devise to that purpose is good —
A testator may by devise give another power
dispose of his property both real & personal: bu[t]
he do it in common every day language or

it seems the person so impowered can go no further in the disposition of the land (for this niceity is confined to the real estati only) than to improve & take care of it himself or lease it at will. but if technical language be made use of in the power, or if the testator go on in mere com-mon language & say, that the trustee shall
Mo. 86/78. have the same power to convey it that the
734 –
Yel. 73 owner had, he may give a title ~~he may give a~~
Rol. 261 – ~~table~~ to any extent – These authorities to sell &c are distinguished into what is termed naked ~~&c~~ powers, & powers coupled with an interest – A naked power or authority is when the person intrusted to sell has no interest in the avails as if one devise that his Executors shall sell his lands to pay debts: here if any surplus remains after discharging the debts the Exrs hold it as trus-tees for the heir, to whom they must pay it over – In a case of this kind if the Exr. neglects or refu-ses to sell, Chan. will compel him – But if the Exr. appointed refuses to act as Exr. or to sell the land, which he may do without acting as Exr., for the power to sell is a seperate bequest men-t, Chan. will take the office upon itself & direct the proper officers of the Court to make the sale & application intended by the testator for in Chan. it is a principle that a trust is not to fail for want of a trustee

But Chan. will always get rid of the business, if a trustee can be found: so that if a testator devise that his land shall be sold to pay debts but does not direct by whom, if there be an Ex. Chan. will consider him the trustee because it is his duty to pay the debts — In the performance of this duty of selling land by direction of the testator, it has been adjudged that the Executor does not act as Exr. but under a special power as atty, consequently that this power must be strictly followed, that if there be two Executors vested by the words of the devise with the power, both must join to make a valid sale; & if one of the Exrs. dies no sale can be made by the survivor, neither can the Exr. of any such Exr. join in the — but if they acted as Exrs in such sale, a conveyance by the survivor, or by his Exr. would be — This distinction between the executorial power of the Exr. & the authority to sell producing many inconveniencies, the Courts have narrowed down the rule as much as possible, so that if instead of designating the Exrs by name the testator say in his devise "my Exrs" & there be more than two, yet if two join in the conveyance so as to satisfy the letter of the Devise, it is holden sufficient — & if the expi—

in the will be "to J. & I. my Executors" calling them by their name & by their title of Exrs. when giving the power; a sale by them shall be considered as done by them as Exrs. & so a conveyance by one good. ~~But~~ If during the delay of the Exr. where he refuses to sell, the heir take it upon him to sell, the sale would be invalid, but yet he may in such case recover the land out of the hands of the Exr. & in some cases, perhaps, might be empowered or rather directed by Chan. to sell for the purposes of the trust—

A power coupled with an Interest, is when the person empowered has some interest, or personal advantage resulting from his authority to sell— As when the testator devises to his Executors to sell, pay debts &c; this differs from a devise that the Exrs. shall sell, or that the land shall be sold by the Exrs. which is but a naked power, & the surplus if any goes to the heir: whereas in case of a devise to the Exr. to sell &c. if there be a surplus after answering the other purposes of the bequest, it goes to the benefit of the Exr.; neither does the fee, in this latter case descend to the heir as it does in the former untill the sale, but goes immediately to the Exrs.— The authority given in Conn. to Exrs., through the medium of the Court of Probate, to sell land in default of personal assets, is always a naked power ——

Of Devises

Coverture is no disqualification to take a devise: but yet if the husb. choose, he may forbid the wife's accepting the devise & such disagreement would be conclusive at Law — but Chan. on proper application will secure such devised premises to the wife notwithstanding such disagreement of the husb. An alien may take by Devise but cannot hold the land any longer than by proper process (called Office found) executed, he is found to be an alien, for thereupon the land goes to the [illegible] But untill Office found he may hold & defend against all intruders — But if no such process be had & the land remain in his possession until his death, still such land, nor indeed any thing can pass by descent to his Children or other relatives. for he is destitute of inheritable blood. Bastards cannot take by devise unless specially named, by their name acquired by reputation — for a devise to A.'s oldest son or issue, illegitimate, or to his bastard son or indeed in any way, except to him by the name by reputation acquired, will be void — A devise is never construed absolutely void for incertainty, unless from necessity, for if by possibility it can be reduced to a certainty either [illegible]

Co. L. 3. 123 — P. P. Wil. 529 — 1st Atk. 410 —

Rey 82. the subject matter, or to the person of the devisee it will be good - It has been settled that a Child in ventre sa mere may take by devise, if the words constituting such devise be in the future tense intimating that such child shall take when born or as it is termed a devise per verba de futuro - But

Moor. 637 / Ld. E. 423 / id. 230 / Rey. 83 / contra. Moor 177 / Roll. 609. / Lev. 135. / 5. Mod. Wil 109 - it seems not altogether settled whether if the devise be per verba de presenti, it will be good tho' this is the better, & by far the most reasonable distinction, as no testator could ever have any other notion than that the Child should take when born

If the person of the devisee be sufficiently descri-bed he will take tho' not named or even misna-med - Hob. 32 If lands be devised to the posterity of A. his lineal descendants, if any shall take & in default of them his collateral heirs, if of the whole blood - And a devise to a particular stock or house will be good & go to the heir general of such stock or house, & not to all in equal degree - So a devise to ones nearest relations or kin will be good, & if it be of perso-nal property, it will, under such description, be divided equally to those in equal degree ac-cording to the Stat. of distributions - So if it be of both real & personal propy to the next of kin, the terms of the devise purporting the design of the testator to be, that it should all be disposed of

in the same manner, & the Stat. of distribut
directing the disposition of the personalty, it ha
been determined, that the real as well as
personal property should ~~all be disposed of in the same manner~~ be divided among those in eq
1st Ves. 335. degree - A case of the devise of real estate
to the next of kin, is not to be found, but ac
-cording to principle it should seem that
heir general only & not ~~the~~ all in equal de
-ee, would take - In Contr. where real & pers
-nal property go to the same persons, doubt
- less such devise would be construed to give
all in equal degree according to the Stat. of Distr.
The term Children is a good word of purch.
& is not used like the term heir to designa
the quantity of interest - A devise to J.S. &
Children, creates an estate to J.S. & his Childr.
jointly, if he has then any children born, &
if not, but have after born Children, it is an
estate to J.S. for his life, with Remainder to
6 Co. 17. after born Children, for life or in fee accordi
to the terms made use of - The term heir te
-nically speaking is never a word of purch.
but if the testator use it in such a manner as
to make it evident that the testator meant to
it in a manner different from the techni
sense, & as a word of purchase, it will be so tak
As a devise to the heir of A. he (A) being alive is not goo
but if it be to the heir of A. now living, it will be good -

Of Devises

Before the Stat. of Car. the same rules of revocation prevailed both as to real & personal prop.y — this Stat. has made a wide distinction between the two species of property as it respects express revocations, but as to implied Revocations the law remains as before the Stat. — In the State of Newyork there is the same Stat. of respecting revocations as in Eng., but in Con.t there is ~~is~~ no such Stat., so that the business remains as at common law —

Express revocations at common law might be either by writing or by parol — Any writing whatever be the form, or whether witnessed or sealed or not, was, if authentic & purporting a revocation, at com. law deemed to be a revocation — So too, any solemn declaration by the testator that he revoked his will, that his will should not stand, or the like, if done *animo revocandi*, was a sufficient revocation. But a hasty expression not spoken with special reference to the will nor used *animo revocandi*, was never taken to be a revocation nor was a mere expression of a design to alter, or make a new will hereafter, ever taken to be such — Implied revocations may be either by words or acts — As if one make a solemn declaration in presence of Witnesses incompatible

1 Rol. 615
2 Vez. 215
1 Vez. 57
2 Co. E. 306

with the operation of the Devise, it is a revo-
-cation of the Will- as if after the will m[ade]
the testator should declare that his heir
should have the same land which by
will was given to another, the will not-
standing- & this be a solemn declaration
1st. Sid. 73. before witnesses, it would be an implied r[ev]-
-cation- Or if the testator make a subse-
-quent will ~~will~~ inconsitent with the form[er]
such former will is thereby revoked, alth[o']
the latter will, be by accident lost, so that the
1st. Will. 514- person die intestate thereby- But the mer[e]
making of a subsequent will, if it be neith[er]
3d. Mod. 203 proved, nor found by the Jury to be inconsist[ent]
Sal. 592 with the first, will be no revocation- If th[e]
jury find that a subsequent will was made
& that it was different from ~~with~~ ~~with~~ the for[mer]
but that they are ignorant in what particu[lar]
Bro. Par. the difference ~~——~~ consisted, it has been deci[ded]
3d. Wil. 497 Corb. p. 87. after great consideration to be no revocation -
(a will may be different from, without being inconsistent with, an[other])
A codicil which is an appendage to a will
made afterwards, is so far a revocation [of]
1st. Vez. 32 the Will, & so far only, as it is inconsisten[t]
with the bequests of it-

If a testator make a second will under a
false impression in point of fact, as if he supp[osed]
the Devisee under the first Will to be dead, when he is

the latter will in such case, is no revocation of
the former - But if the mistake under which the
testator labors, be a mistake in point of law, as
if he suppose the devise in the first will to be
contrary to Law, when it was not, still such second
will made under such false impression will be
a revocation of the former will - When a second
will impliedly revokes the first but not expressly
by words of revocation, & the second be afterwards
cancelled, & the first not, the first is set up again
by such cancelling of the second - But if such
second will contain an express clause of revoca-
Bun. 512 tion the cancelling that will merely without some
ow. 49. 53 other act, as republication, will not set up the first
will - Any act evidential of the testators in-
-tention to revoke, as tearing obliterating, can-
-celling, burning &c is a revocation, tho' the total
destruction of the material parts of the will dont
insue - But if any of those acts be done by mis-
-take & not animo revocandi, it is no revocation -
Change of the testators circumstances is in one case
viz. marriage & having issue, is a revocation of
a Devise - this goes upon the ground that every
one is bound in duty as well as stimulated by
affection to provide for his offspring - No case has
gone so far as to decide that marriage alone
is a revocation; neither has marriage & having issue

been determined to be a revocation, excep[t in]
cases where the devise went to the total disin[her]
-itance of the Wife & Children - & it must be
a matter of discretion with the Court to deci[de]
1st P. Wt. how nigh such will must come to a total d[is]
304 - inheritance of the wife & issue in order to pro[nounce]
2d. Bur. - nce such change of circumstances a revoc[ation]
2182
But the law in this respect as well as in
Doug. 52 - others relating to Devises, going upon the de[clared]
38 - or implied intention of the testator, any evide[nce]
which shews that it was the intention of the [testa-]
- tor that his will should stand, his marriage no[t]
- withstanding, will establish the will - & to th[is]
point parol testimony is admissible -
If a feme sole make a will & after marr[ies]
such marriage is a total revocation of the
will, as it respects the personalty, & a suspen-
- sion of it as it respects the realty, during
coverture, so that if she survive her husb. [her]
4 Co. 61 will as to that, will stand, but if she die dur[ing]
Plow. 343. the Coverture the will is revoked -
If one become insane after making a will [the]
accident works no revocation of his will -
If after the will made the testator make[s]
any alteration in the estate by the will devi[sed]
the will is thereby revoked, & that whether a re[voca-]
-tion was thereby intended or not - for if the tes[tator]

repurchase the land ~~to hold~~ after alienation, to hold by a different, or even the same tenure, yet is the
Rol. 615- will revoked— And even tho' the change in the estate devised be made for the express purpose of giving efficacy to the will, still if made after the devise, it is a revocation of it— as if one having an estate tail & make his will of such land & then dock the intailment to give
Lw. 108- efficacy to the will, still is it a revocation— And so far has this folly been carried, that when one seized of an estate in fee simple, but supposing it to be a fee tail, made his will of the premises,
Ath. 803- & then to give some effect to it, suffered a recovery still the devise was held to be thereby revoked
The only thing considered in these cases is whether the testator intended to change his estate, & not (as in the other parts of the Law of devises) what was the intention of the testator respecting the devise—
Wills. 311- The same is the rule as it respects equitable estates as trusts &c— A mere partition among Coparceners or tenants in common ~~without~~ any change of interest further than to create an estate in
Ray. 240- severalty is not a revocation of a previous devise
An intentional conveyance which fails of effect through the illegality of the conveyance, or the legal incapacity of the grantee to take, is a revocation— as if one after devising his lands to a

stranger makes a deed of the same to his wife, tho' this latter conveyance is void, yet it operates a revocation of the devise. Again if after devising, the devisor makes a subsequent devise of the same to a person by law incapable of taking by devise as a Corporation, which is an artificial person, the

Pop. 108 — 1st W. Blac. 349. — Rol. 416. — 3. Atk. 72. — 1. Bro. Par. 450 — 9th Mod. 190 —

the latter devise conveys no interest, being against law, still it is a revocation of the former, for it is evidential of the testator's intention that the first devisee shouldnot have the

If the testator after making the will be disseized & so die, the will is revoked, unless the disseizin be covenous, as where the estate being devised to a younger son & the eldest son disseize the father just before his death for the purpose of annulling the will that he might himself succeed to the estate

1st Rol. 378, 616 —

by heirship — But after the devise made, if the testator be disseized, but & after reenter the disseizin is thereby purged, & the will will be good notwithstanding the disseizin which intervened the making of the devise & ~~the death~~ its consummation by the death of the testator — & it seems the better opinion that a will would be good tho' made during a disseizin of the testator, provided he afterwards reenter & die seized — There are some exceptions to the rule of a subsequent alienation being a re-

revocation of a devise; for certain kinds of condition-
-al alienations work only a revocation pro tanto.
A mortgage is a principal exception: it being never
a total revocation except when made to the
...l. 15. Devisee, but pro tanto only — but when made
...Atk. 74. to the Devisee, whether it be a mortgage in fee or for
...Ray 1068. years only, it is a total revocation — Again if
one be in debt, & having devised his land, after-
wards convey the same to another person to dis-
-pose of for the purpose of paying the testator's debts,
in this case the surplus avails of the land sold,
after the debts are discharged are in such trus-
...Atk. 372. tee's hands in trust for the Devisee, & so such alie-
-nation is a revocation pro tanto only — Again
if after devising his lands the devisor make a lease
of them for years, not altering the fee, but only
carving a portion out of it, this is a revocation
pro tanto only, unless the lease be to the devisee
himself, & be by the terms of it to begin at
...Rol. 616. the instant of the testator's death in which
...9. 49. case it is a total revocation — Thus far the Com.
Law which is the Law of Connecticut —

The Stat. of Car. 2d is that "No devise in writing of lands
"tenements & hereditaments or any clause thereof,
"shall be revocable otherwise than by some other will
"or codicil in writing, or other writing declaring the same,
"& signed by the testator in the presence of three witnesses

"or by burning, tearing or obliterating the
"by the testator himself, or in his presence & by
"his direction" — Upon this Stat. it has been
determined that it does not affect implied
revocations at all; & the latter clause relative
to tearing &c is but in affirmance of the Com.
law, & the same rules of quo animo it was done
are observed, as were at common law; for if a man
should tear or obliterate his will merely be-
cause he supposed a second, had revoked it, when
that 2d. one was incomplete & would not pass
the land; such tearing would not be deemed a
revocation; because not done for the purpose of
revoking in itself, but from an apprehension that
it was already revoked by the other will, which
Cow. 52 in fact was no revocation because not made
1 P. Wil. 346 conformably to the requisites of the Stat. so as
2 W. Blac. 1043 to make it either a disposing will or a revoking
writing — Upon that clause of the above
paragraph respecting revocations, which says
"except by some will or codicil" &c, it has been
determined that such will or codicil in order
to work an implied revocation, must be ex-
ecuted according to the requisites of the Stat. to
pass real estates, & yet if the writing be for the
purpose of revocation only, & not of disposing, it is
not requisite that it should be executed accord-

to those requisites, if signed in the presence of three witnesses it is enough — So that the distinction is, that if the latter will be a disposing as well as a revoking will, it must be executed according to the Stat. requisitions for making a disposing will, or it will not be a revoking will. but if it be a revoking will only, it need not be so executed, provided it has the requisites of the revoking clause — & such last mentioned will, towit. a revoking will, if it contains no ~~new~~ dispositions, 1 Mod. 358. tho' it be executed according to all the formalities ...1.79.–8.1 of a good disposing will, yet if it be not signed 3 Wil. 13. by the testator at the bottom & in the presence of three witnesses, will have no effect as a revocation — Tho' it is said in the books that the revoking clause in the Stat. of Fr. has made no difference in the case of implied revocations, yet this is not strictly true: for at com. law a subsequent disposing will tho' not executed according to the Stat. of Fr. to pass real estate, & of course of no avail for that purpose, was always held an implied revocation of the first will: but under the revoking clause it has been held that no disposing will unless executed according to the Stat. directing the mode of executing devises of lands, is a revocation — So that in case of this kind, it is evident that the Stat. has altered the com. law relative to implied revocations —

Of Devises –

Republic.

When a will is revoked, it may if not quite destroyed, be revived again by a republica-tion – So too the devises of an unrevoked will may be enlarged, by republication, so that it may embrace the after purchased lands, if the words of the will be sufficiently general or descriptive to carry such land – Republication may be either express, or implied – In Eng. & where a Stat. similar to the Eng. upon the subject exists, it is certain that no express republication by parol is of any force, but that to be operative, it must be according to the formalities required in the execution of a will – In Connecticut an opinion, supported by one decision, has prevailed that a parol republication of a will of land would be good; but this is manifestly repugnant to the spirit of the Stat. requiring three witnesses signing in the testators presence to a will of land; a republication being in effect, making a new will – N.B. the above mentioned case together with the notion of parol republication's being effectual has been recently done a way by a decision of the Sup.

As the clause in the Stat. of 29th of Car. 2d respecting revocations does not comprehend implied revoca-

so are not implied republications within the Stat. & therefore both here & in Eng they are in the same situation as at Com. law — So that when a revocation was by implication, a republication of such will may also be by implication & any act evidential of the devisor's intention to republish is sufficient — As if one impliedly revoke a first will by making a second, & then destroy the second leaving the first entire, such destruction of the second, will be an implied republication of the first — A codicil duly executed according to the Stat. of frauds is deemed a republication; & even if it in itself contain only a bequest of personal propy. yet if executed in the manner prescribed by the Stat. for passing real estate, it is the better opinion that it would be a sufficient republication of a will of lands — And when a will is republished it speaks from the time of the republication & will pass all the property the devisor then had if the expressions in the will were general & comprehensive enough to embrace it, tho' it might, any quantity of it, be acquired after the making of the will — for the doctrine of republications vide 3. Atk. 180, 9. Mod. 68. 78. 1. Vez. 473 485 & 2d. P. Wil. 275 —

Of Devises

Parol. Averments 6 Co. 68. 1 St. Vez. 182. 2 Atk. 216. 373. Plow. 345.

It is a rule that no parol evidence is admissible to vary the obvious meaning of a will, tho language made use of in a will — But if an equivocal word is made use of, as if a son be named devisee in the will under that appellation, & there be no son living but there be a grandson, parol evidence is admissible to shew that the Grandson was meant by the word son — This however is not so far an equivocal term. But if the testator call him Grandson in other parts of the will it will be allowable to let in parol proof of his meaning him by the word son, in another part of the same will — Again in the instance of the devise being to ventrici pueris, parol proof was admitted to shew which was meant an elder

Moor 105 daughter or a son, the circumstances of the case making it doubtful — But when the ambiguity arises upon the face of the will from the contents — confused manner of wording the will, parol proof of the testators intention can not be admitted for the Court must put that construction upon the will which seems most evidently to have been the intention from the language as it stands; and if no determination can be formed of its meaning, the will must, at least such unintelligible part of it, be rejected for uncertainty — But if the language of the will is plain but

intent uncertain from something dehors the the will, parol evidence is admissible to explain the testator's intention; for in such case the parol proof is admitted not to contradict the will, but stands with it = as if one devise his manor of Dale to J.S. & there be two manors of Dale belonging to the testator, here is no ambiguity on the face of the will, but it arises from an extrinsick fact, & in in such case parol proof may be admitted to shew so which of his manors the testator meant to devise to J.S. - But if a testator devise his estate in this form "to one of my sons" this is a patent ambiguity & cannot be aided by parol proof, & the will must be deemed void for uncertainty — & the rules apply equally to wills of real & personal propy, as it respects parol averments - for the above subject vide 8th Co. 155. 2d P. Wil. 372. 2d Vey. 216 6th Mod. 199 2d P. Wil. 136. Moore 185 — There is a wide difference in the effect of a will & a deed in this respect - that in a deed if the grantee be sufficiently identified to leave no doubt about the person really intended, but yet the grantee be misnamed it is a void grant - But in a will if the devisee be sufficiently described to make it evident who was intended a misnomer of such devisee will not vitiate the devise — When a will, considering the words used in their technical sense, is not ambiguous, but circum-

- stances render it probable that the testa-
- tor did not mean that his language shou
be technically understood, but be understood
its ~~their~~ common vulgar acceptation, paro
proof of such intention will be admitted - a
if one devise all his estate both real & per-
- sonal to A. he paying all the testator's d
& legacies, the technical sense of such exp-
- ions would be give A. an estate for life on
but in such case parol proof would be re
to shew from the magnitude of the debts comp
with the value of the estate, that the testa
intention must have been to pass an estate
fee to A. - Again, a devise to A. & his Children, w
if A. had then any Children born, be a devise t
for life & his Children would take as purcha
with him - but if he had no Children then
it would be an estate tail to A., the word Ch
in a will being tantamount to issue of the
parol proof would therefore in such case be
6 Co. 16. eived to shew whether there were any children
Sal. 204. at the time of making the will or not - The
cases where the words used in a will are neither
- nical nor ambiguous, but plain words of
in appearance, yet if the estate of the testator
be totally inconsistent with such a disposition
which circumstance, if considered, it is obvious th

the testator did not mean to be understood in the manner
…no. which the language in the will would of itself obviously
…72 import, parol proof of such circumstances will be admitted
to shew the testator's real intention —

Parol proof is admissible to rebut an equity or oust an implication of law as it is called, as in case where an Ex.r has a legacy left him by which in Equity he is cut off from the undisposed of residue of the personalty but parol proof is admitted to shew that such residue was intended to go to the Ex.r the particular legacy notwithstanding — but on the other hand if there be no legacy left to the Ex.r parol proof is not allowable to shew ~~that~~ it was not the testator's design that the Ex.r should not have the residue —

It seems after all these exceptions ~~then~~ that the rule that parol proof may not be admitted to explain a will comes to this That no mere parol declarations of the testator respecting his intentions, is admissible when the language of the will is plain & the state of the testator's property is such as will allow of a literal performance of the will — Neither may the express words of the will be contradicted by parol proof — but such proof only may be admitted as may stand with the will & tend to explain it — for different parts of this head vide. 2d Stra. 1261. Ld Ray. 1324. 1. Bea. 322 —

Of Alienation by Deed

A deed among writers upon law is defined to be a sealed instrument executed by the party — this app[lies] equally to bonds as to conveyances of land — As applicable to Conn. law this definition is defective, for the circumstance of a seal is not at all essential to a specialty unless made so by statute — But of those species of deeds here intended, to wit Deeds of conveyance, it is observable that som[e] requisites are necessary — It is absolutely nec[essary] to the validity of a deed that there be a consideration — either expressed in the deed, or in fact rec^d. by the p[arty] & without this requisite the deed would be a nul[lity] even between the parties: but the validity of the d[eed] as between grantor & grantee does not at all dep[end] upon the quantum of the consideration — neither between them, is it essential whether any consid[er]ation was in fact given, or received, or not, provid[ed it] be expressed: for after having acknowledged the [recep]tion of a consideration the grantor can not be permit[ted] to deny the fact in the face of his own deed — & [if no] consideration be expressed, still one may be proved in [sup]port of a deed — & again if the deed be expressive of [a] consideration, as value rec^d yet if any other writing executed at the same time which shews that the [conside]ration expressed was fictitious, or illegal, it defeats the [deed]. Shewing by parol proof that there was in fact a [consi]deration given when none is expressed in a deed do[es] not impune the rule that parol proof cannot be ad[mitted] to vary the nature of a writing for such proof

will stand with the deed: And indeed the rule is never supposed to go so far as to prohibit parol proof being given to give efficacy to a writing which without it would be a mere dead letter - in such case it does not vary the operation for without it such writing had no operation at all - Considerations are of two kinds valuable as money, marriage &c. or good as love & affection - Altho: the grantor or obligor can never be allowed to attack his own deed on the ground of a want of consideration, or its being inadequate after having acknowledged one in the deed; yet for turpitude or illegality of consideration he may avoid it, as if it be usurious, or given upon an immoral purpose; & for the establishment of such facts parol proof may be introduced - If the illegallity appear upon the face of the record a demurrer is the proper defence - or if it will appear upon the instrument declared on or in the condition to it, which the Pltff does not set forth in his declaration, pray oyer of such illegal condition & after making it a part of the Record by recital a demurrer will reach it - but if the illegallity rests in pais plead such illegallity & support the plea by parol proof if none of a higher nature can be had -

The consideration expressed in a deed for the conveyance of land is by no means conclusive proof of the real consideration - for it is quite immaterial to the validity of the deed whether the true consideration be the one expressed or not: & to shew what the consideration actually was the

grantee even, may go into parol proof; not for the purpose of defeating the deed, but for the purpose of doing justice between the parties in any collateral matter which might arise as, for instance, if the grantee having been evicted should bring his action for against the grantor upon the covenants in the deed - it would in such case be competent for either party to shew even by parol, the actual amount of the consideration to enable the jury to assess the damages properly - In the Case of a mortgage however, when there is no other evidence of the debt than what the deed contains; such express consideration is always taken to be the real one & is uncontrovertable - A good consideration as love &c. is as valid between the parties, as one for a valuable consideration; but is of no validity against prior Creditors, when the property of the grantor is adequate to the discharge of such debts - But such voluntary conveyance cannot be considered to be fraudulent unless made with the actual intention of defrauding & as a general rule, voluntary conveyances will be deemed good against subsequent Creditors - But a conveyance made with a fraudulent design to Cheat a Creditor will always be so deemed, & holden void against the Creditor whether he became so prior or subsequent to such conveyance - The Deed according to the terms of it may be for an adequate

a valuable consideration, yet may a Creditor go into the real inadequacy of it & so prove it fraudulent. In case of a voluntary conveyance, all other propy of the grantor must be exhausted before the Creditor can come upon such conveyed property - & if such conveyance be made without a fraudulent intention, tho' it be while there were existing debts, yet if the grantor had at the time a sufficiency of other propy on hand for the discharge of all; & the Credr. lie by until such property be wasted, having knowledge at the same time of the conveyance, he shall hardly be permitted after such negligence to lay hold of such voluntarily conveyed property to pay his demand - If one make a voluntary bona fide conveyance, & afterwards sell the same propy to another, such purchaser, if he had knowledge of the former conveyance, or what the law deems sufficient means of knowledge, cannot hold such land - But if the conveyance be fraudulent, such after purchaser with notice will hold - In Eng. these matters are regulated by the Stats. of Eliz. & Jas. & in N. York they have similar Stat. regulations - but in Conn. we have no such Stat. so that some have doubted whether our law was the same; but Ld. Mansfield says that the Stats. of Eliz. & Jas. did not alter the principles of the com. law - if so, then undoubtedly our law is the same. Settlements made on account of marriage are deemed to be for a valuable consideration -

No conveyance of land is good unless by Deed - In Eng. it

Co.L. 7-8. is necessary that such Deed be signed & sealed, & w[...]
be inoperative if not attended with these requi[...]
There are however, one or two cases reported in the
Books by which a deed was held good tho' not se[...]
by both parties – Sealing however must be con[...]
-ed an indispensable requisite as a gen.^l rule – [...]
Laws of Cond.^t sealing does not seem to be consid[...]
an indispensable requisite to a Deed tho' alway[...]
practised – Our Stat. is silent as it respects a seal[...]
probably our Courts would consider it of no impo[...]
2^d Rol. 22 5th Co. 23. If a Deed be sealed by the request or order of the p[...]
-ies it is as good as if done by them personall[...]
2^d Lev. 220 If ~~a Deed~~ the seal, in Eng., be destroyed by a s[...]
-er, or by accident, the Deed is by such mutilat[...]
destroyed – It is a general rule that if [...]
the grantor make any exception in his conv[...]
-ance of land, the thing excepted does not pa[...]
but there are exceptions to this rule – for one
grant twenty acres of land & then except one
twenty, the exception is void – or if one gran[...]
house & Shop, & then except the Shop, such exce[...]
-tion is void & the shop passes – The true rule d[...]
-ble from the authorities upon this subject is
if the grantor grant his land using the appr[...]
-ate terms of a grant of such thing & then excepts a part o[...]
the above examples, the whole passes, the excep[...]
being void for repugnancy – But if the gen.^l term[...]
used in the grant, & any thing under the approp[...]
term is excepted, such exception is good & the particu[...]

does not pass - as for example if one grant all his lands, by which gen.l expression every thing upon & under it of a real nature passes; & then except the house or the wood &c by the proper, appropriate term of house, wood &c, the exception is good - So if one grant his house excepting a certain Chamber, the exception is good - To this rule there is an exception; as if a man make a grant under the gen.l terms & except by the appropriate term, & it is finally ascertained that the grantor owned nothing ~~in~~ more in the premises than was excepted in the appropriate term, such exception is in that case void - for otherwise the grant itself would be a nullity -

It is necessary that a Deed be delivered - but what shall be deemed a delivery is not unfrequently a question - If the act done be of such a nature as would convince a rational mind that it was intend-ed as a delivery, it will be taken as such, whether there was an actual manual tradition or not -

The grantee being in possession of the deed is prima facie evidence of a delivery, which however may be rebutted by proof - A deed may be delivered to a third Person as an Escrow, to be by him delivered over to the Grantee upon the happening of some event spe-cified, & when thus delivered over the deed has relation to the first delivery, & requires no further act of the grantor to make it good - but if the event never happen then the deed is never to be delivered over & is of no validity -

The person holding the deed in such case is vested with a kind

of judicial power to decide when the condition
is sufficiently complied with to warrant a del-
over— this some times affords grounds of litig-
& if the Court determine that such delivery was
Co. Lit. 85 misjudged, the Deed is thereby nullified, if not
2d Rol. 25 confirmed— A Deed cannot be delivered as an esc-
Co. L. 36 row to the grantee himself, for if the grantor
Co. L. 52 o 88 4- annex ever so many oral conditions to his delivery
Hob. 24 made to the grantee himself, such conditions are
9th Co. 137 contra Co. L. 335 Moore 697- & the property vests instantaneously & absolutely.
The date of a Deed is presumptive evidence of the
time of its delivery, & consequently of its operation,
a deed commences from the delivery; but the evid.
arising from the date may be rebutted by parol
proof— & even it is not absolutely essential that
Mal. 193 Deed be dated; & a false or impossible date as
1 Co. 5- 2d Rol. 21- 30th of Feby; will not vitiate it—
Deeds of land contain two covenants usually,
a covenant of seizin & 2dly a covenant of warranty
after an eviction of the Grantee an action may
maintained upon either or both these covenants
& upon the former, before eviction, which is indeed
proper time— But no action can be maintained
upon the Covenant of warranty untill after an evic-
-tion— When the grantee is sued in eject- for
land it is his most prudent course to vouch in
grantor either by writ of voucher, or (in terms (the
former is the preferable mode on account of the rec.
evidence which it furnishes of the fact) who may
in & defend or not as he chooses— But if he does not

in & defend, the grantee must defend as well as he can, in order to lay a foundation to come back upon the grantor if he loses the land – In which case he will have an action upon the covenants of warranty in which he will be in Eng. entitled to recover the price paid for the land with all legal & equitable cost & interest: but in Conn.t he will further be allowed to recover the real damage accruing by the loss of the land if it amount to more than the price given Cost &c – But if he do not vouch in the grantor, he can recover only on the covenants of seizin, which will only be the price given & his cost of suit – Further the grantor may in such case when after the eviction by legal process, be allowed to contest with the grantee, that he had a good title & could have defended the grantee had he been notified – & if he make out that his title was good & defensible, the action of the grantee will fail: but if vouched, he never can afterwards contend the point of his title in an action against him on the Covenants ~~of seizin~~ of warranty – Quitclaim Deeds usually contain no covenants at all, & the question has been made whether any remedy could be had in the case of eviction – this depends on the nature of the bargain – If it was a plain bargain of hazzard no action lies for the grantee against the grantor – But if the bargain was not a bargain of hazzard & the grantee have actually paid ~~th~~ for the land, he may have an action for money had & rec.d the consideration totally failing –

In Eng. it is not absolutely necessary to have subscribing Witnesses to a deed, tho' if contested it must in some way be proved – But in Conn.t two witnesses are required by Stat. to subscribe the deed & by them only may it be proved if they can be had – A deed however may be good by way of Covenant to estop. between the Grantor & grantee without subscribing witnesses – but never against third persons as after purchasers & attaching Creditors, & that whether they knew of such previous sale or not – If the grantee in a deed without witnesses be evicted he may have an action of Covenant. a covenant being good without witnesses – When there is a defect in a deed unless it be to volunteers unless 3.d persons are interested Chan. will supply the defect – Our Stat. requires to be acknowledged & recorded –

Of Alienation by Deed

Doubtless one Creditor may, by purchasing the prop[erty] of the debtor secure himself in preference to anoth[er] if such purchase be bonafide, but if it be with an intention to assist in defrauding other Creditors as w[ell] as to secure his own demand, such purchase will be [deem]-ed fraudulent & void as against the other Creditors – & i[f there] be a considerable difference between the value of [the] property & the price given it will be good evidence that the debtor has not in fact parted with all his [in]-terest in the property so sold, & that the buyer holds in trust for him or is to give him a further considera[tion] for it at some future period – & it will be deemed as much a fraud upon Creditors as if it had been a voluntary grant – & if there be other Creditors enough to exhaust the whole of such prop[ert]y so sold, the purchaser w[ill] lose his whole debt, for being considered a particip[ator] -n the fraud is postponed to other Creditors: & such prop[erty] levied upon as the property of the seller – But if the [debt]-or have other lands &c enough to satisfy the demands [against] him, & wishes to preserve a particular piece of ground [he may] convey it away merely for the sake of keeping it in [the family] & it will not be deemed fraudulent – But it will no[t be so] to convey away personal property, leaving none [but] real to levy Executions upon, because it is less advan[tage]-ous to the Creditor to take real than personal prop[erty]. But in the State of N. York & elsewhere, where real est[ate] may be sold at vendue in the same manner as perso[nal] property, upon the Exn., this distinction should seem to be [with]-out foundation – The law in case of fraudulent con[veyances] is in some measure different from what it is in other illeg[al tr]-actions – for if the grantee brings his action against the gran[tor] for possession he will prevail, for the covenants cannot be con[tradic]-ted, but in other illegal transactions where the parties are in par[i delic]-to, the maxim of potior est conditio possidentis prevails –
A fraudulent conveyance is equally strong against the heir of the [grantor] as against the grantor himself – The heir [illegible] is in the grantee [illegible]

Of Alienation by Execution

At com. law no execution was leviable upon land so as to operate as an alienation & vest the fee, except lands descended to an heir under the incumbrance of the ancestor's debts in which case a levari facias went immediately against the land & not against the heir; & by the levy of such Exn. the fee of the land was transferred to the Creditor —— There were by com. law in Eng. three kinds of Executions. to wit. the leva. facias which went against the lands & chattels; but in a qualified sense only against the land, & not in such manner as to alienate the fee, except in the case above mentioned, — But against the issues of the land as the emblements, rents &c — When the land is leased out by the debtor, the way to obtain the rents, is to levy upon the land & then notify the Lessee to pay the rent to such Creditor which he is compellable to do — The second kind of Exn. is a fieri facias, which goes against Chattels only, but it is against real as well as personal Chattels & when the propy is by virtue of a fi. fa. sold, the property is vested absolutely in the vendee — Chattels real. as leasehold estate may be either sold or extended by virtue of a fi. fa. — & 3dly the Capias ad satisfaciendum goes against the body only. & that by com. law only in case of a judgt in an action for an injury done vi et armis — but by Stat. it is extended to all actions of debt & those in nature of debt. & indeed to almost all actions —

Of Alienation by Execution

Other Exns have been given by Stat. as that on the Stat. Mercht., which goes both against [illegible] & personal property; against the former how[ever] only by way of extent, i.e. to hold the land until [the] issues & profits of it pay the debt. This process [was] at first confined to Merchants, was afterwards [under] the name of Stat. Staple, extended to others, [& fin]ally by the name of a recogn.e in the nature [of] Stat. Mercht., to all kinds of Debts, where the Debtor will consent voluntarily to acknowledge his indebtedness before the proper Magistrate. The Exn [in] case of Stat. Mercht., Stat. Staple & Recog.e are al[ike] a like & go against both Chattels & land; against the latter, however only in case of the insufficiency of the former. Another kind of Stat. Exn. [is] an Elegit which may issue ~~against~~ upon any species of judg.t if the Creditor choose it & it goes against the goods & one moiety of the lands, against the lands however, only in default of goods to satisfy it. The goods are not sold at vendue upon an elegit but are appraised to the Creditor.

In Connecticut. our Exn. is but of one kind it goes against the goods, lands, & body of the Debtor. By turning out personal property the Debtor may always secure his body & lands from [it], for the Offr. is obliged to levy on personal property if exposed to him, but on failure of personalty, the Cred.r has

election either to take real property or the body - & if he take the body, he can not while that is holden take any thing else - When lands are taken they can not in Conn.t be sold at vendue, but must be appraised by three indifferent freeholders, one to be chosen by the Creditor, one by the Debtor & the third if not agreed on by the parties, to be appointed by a Just. of peace - & if the Debtor neglects or refuses to elect one the Majesthat appoints two - & such levy & appraisal vests a fee simple in the Creditor - But by our Stat. none but fee simple lands can be appraised off on Ex.n, because no other lands are mentioned in the Stat. - And yet it is the practice to levy upon entailed lands, those holden by dower, Curtesy or by way of extent during the life of the Debtor who has such prop.y in them, if necessary to be so long holden to satisfy the Ex.n; & the way practised is to have the value of the land by the year estimated by freeholders as in the case of fee simple lands - & the land set off to the Cred.r for such time as will be sufficient according to such estimation to pay the debt, the estate however determinable upon the death of the Debtor - this mode of proceeding is warranted by long practice tho' supported neither by Stat. nor a decision of Court - & if the Debtor die before the Ex.n is satisfied by such extent (which seems to be a sort of Com. law remedy) the Cred.r may revive his judg.t by Sci. fa. & levy on any other prop.y, if to be had -

Of Alienation by Exn

As our Stat. directs prop.y taken by Exn. to be b-
-ght to be sold at the Post, a doubt has arisen
-ther emblements, terms for years &c which c
-not be brought to the Post. can be sold by vir
of an Exn. — if they cannot (which by the way has n
been decided) it should seem that the com. law re
in such case should be pursued, there being no negati
words in the Stat. prohibiting it — the Com. law re
is by lev. fa. to levy upon & sell the emblem
& extend the terms for years — our practice has how
always been to sell at vendue such emblements —
In case of the debtor's having leased out his fee simp
lands, there seems no way to come at the rent (the
Stat. being silent upon that head) unless it can be d
by adopting ~~the~~ here the com. law mode of levying
as with a lev. fa. & notifying the tenant to attorn
& the Stat. not forbidding it perhaps it might well be don
but the lev. fa. having never been used in Conn.t it is by
no means certain that the Courts would sanction
& yet it is evidently a just mode & legal as far as being
conformable to com. law principles make it so —
Our Courts have resolved that Money may be lev.
upon by an Exn. but not sold as that would be idle
Securities for money, mere evidences of Debt, a
Hardr. 48 Notes, bonds &c cannot it is said be taken & sold
on Exn., not even bank notes — but tho' this be s
law in Eng. it may be doubted of in Conn.t especial
as it respects Bank notes which pass as Cash —

Of Alienation by Exn. -

By the laws of the State of N. York lands may be taken & sold on Exn. & the sale is a complete alienation of the fee ~~but the~~ Lands & other real Estate are not to be taken in Exn. when personal propy can be had - Real propy. is in that State bound from the time of ~~the~~ rendering judgt. if the judgt. be duly entered upon the Rolls - personal propy is bound only from the time of issuing the Exn., & the sale of it by the debtor after that time is void, & the same is the Com. law in the last particular - But in Conn. the law is different, & the propy of both descriptions is bound only by the levy of the Exn.; unless previously levied upon by attacht. which mode of process supercedes the necessity of holding the land &c as bound from ~~the~~ any particular period by operation of law - The Credr. in N. york is at his election to have an Exn. against the Body, or against the goods, or against both goods & land - But having taken the body, while that is holden their law is the same as in Eng. nothing further can be taken - but if the Debtor should die in confinement a new Exn. may be obtained & be levied upon propy. but such Exn. will not relate back to the time of the judgt. so as to avoid intermediate sales -

In Conn. the body may be released any time before it is lodged in Gaol, & propy taken; & indeed the Offr. is obliged to release the body, if sufficient personal property is turned out to him before the body is carried to Gaol - In N. York when the Sheriff does not comply with the requisites of the Stat. in levying his Exn. &c he is ~~not~~ liable to the ~~Credr.~~ agrieved Debtr & also in a penalty, but the sale is allowed to be good -

Of Trespass upon real Estate

For injuries done to real propy the action is tres-pass vi et armis - It is immaterial what p the Pltff has in the land to enable him to maint this action; for it is an action founded upon pos-sion - This possession however must be some-thing more than a mere intrusion without colo or pretension of right, to entitle the holder to this But if there be possession & a colour of title the action will lie altho there be no real & legal title - In Eng. there must be in the case of purchas an actual entry to compleat the title, & so after a disseizin to revest the title, so as to give a right to maintain this action - But in Cont. no actual entry is necessary to the compleation of a title; for a right of possession is considered as possession, except when there is another in claiming the land & holding the lawful owner out - So the own-er of the fee is not always entitled to this ac for if he is compleatly out of possession, either by right or wrong he cannot maintain the action except in ~~such cases~~ particular cases, as where the pos-sion of the tenant is considered the possession of the lessor - When the owner of the fee has gran the estate for years, or for life, he is as it respec the produce of the land, a stranger, & if he should m-dle with the crops or the like, he would be liable in trespa

to his lessee — But for an entry by the owner upon a tenant at will ~~the~~ no action would lie, but yet if he injured the emblements, which by the nature of such tenure belongs to the tenant, an action would lie against the owner — During the term then, the lessee is the only person who can bring an action for a trespass which does not affect the inheritance — But for such injuries as affect the reversionary interest, as cutting timber, plowing meadows &c the reversioner may have his action for such damage, & to this purpose the possession of the lessee is his possession — In this suit the reversioner recovers nothing for the damage done by the same act to the annual profits, but for such, or any other damage done to the Interest of the lessee in the land, the trespassor is liable in trespass to the lessee — So too the lessee may recover for the injury done to the freehold provided he sues first, for he is liable over to the lessor for all injuries done to the freehold either wilful or permissive, if the lessor elect to making so — & as ~~the~~ the trespassor is liable but once for the same offence, if the lessee has recovered of him the lessor cannot but must look to the lessee — but if the lessor first sue & recover for the injury to the freehold, still the trespassor will be liable at the suit of the tenant for the damage done him personally —

Of Trespass upon Real Estate

A tenant at will can have no action for in-
-ries done to the freehold, but only for such [as]
affect the profits of the estate – A lessee at [will]
is liable to the lessor in an action of trespass [for]
any act of such lessee ~~which~~ on his part which
~~is suff~~ determines the will – but a lessee [for]
life or years is not liable in this action to [the]
Co.L. 57 lessor, unless in a case of this kind as when the
Rol. 860 lessor reserved to himself a particular grove
2d. do 551- & the lessee should cut it – the lessor would be enti-
-tled to recover in this action for such injury – but
properly speaking the lessor in such case retains possession
of the grove by the reservation so that this case in truth
forms no exception –

N.B.: It seems very doubtful from the books whether the
reversioner can ever bring an action of trespass vi et armis
for an injury to the freehold upon the strength of the lessee's
possession, considering it as the possession of the lessor
3. Lev. 209 notwithstanding the foregoing doctrine – & it seems that
the action of the reversioner should be Case for such inju-
-ry if any thing – for it ~~is~~ should seem that trespass qua-
clausum fregit can not be maintained unless the Pltff was
in actual possession at the time of the trespass committed
or at the time of the action brought, as in case of a re-entry
after a disseizin, which has relation back to ~~the time~~ [the]
disseizin; – But if the ~~Pltff~~ reversioner had been voluntarily out of poss-
-ion as by lease to another, it is very questionable whether
after re-entry he can maintain trespass vi et armis, for
an injury to the freehold committed during the possession
of his lessee – for being out of possession by his own act
is different from a being ousted by a disseizin, which re-entry does not

When one disseizes another, for the act of disseizin the disseizee may have this action, but for any act subsequent to the disseizin he can not have it un-
2d Rol 553. less he re enter by which such disseizin is purged & then he may have an action of trespass for all mean profits & mean damages to the freehold during the continuance of such disseizin – But if during the time such disseizor held the land a third person trespassed upon the land such trespassor was liable to the disseizor in possession & not to the disseizee after his re entry, for if so he would be twice subjected – It has been a litigated question in Eng. whether the disseizee after reentry can maintain trespass against the lessee of the disseizor, the weight of authorities are however against
2d Rol 552 11 Co 51 sustaining such action, the Deft. in such case coming in by title tho' a defective one – But the disseizee on reentry may always take the emblements – In Conn. it has been the practice, arising from our principles of considering him in possession to whom the right of possession belongs, to suffer the disseizee to recover, not only against the disseizor, even while in possession, but also against all coming in under him in this action – To subject the lessee of the disseizor thus to the disseizee in trespass, seems hard, making him pay for the use of the land twice over – but it would also be hard to deny this action to the disseizee when the disseizor was a bankrupt –

Of Trespass upon Real propy.

When grain is sown by one upon shares upon the land of another, it is in some books said that the owner of the land only can have an action of quare clausum fregit, but it is laid down fully that the person sowing the grain may have the action for such damage in Bul. Nisi Prius —

Bul. Nisi Pri. 85 -

A man is as much liable in this action for trespass committed by his Cattle, as for one committed by himself, & the declaration in that Case says that he went with his Cattle &c — +

Many entries upon the lands of another are not a trespass - as if the landlord enter to secure his rent or to see if the buildings &c are kept in proper repair. So again if one purchase any thing upon the land of another, he has a right to enter for the purpose of carrying it off — The Exr. may enter upon the real estate tho' belonging to the heir, for the purpose of takinging care of the personalty which belongs to him — An Offr. may enter to levy a legal warrant — If one take away another's horse & put him into his (the taker's) inclosures, the owner may enter peaceably & retake him, & even break the Stable door if necessary — but if the horse had by the taker been put into the inclosure of a third person, the owner can not be justified in entering upon the possession of such third person to take his horse — If the Cattle of one break into the inclosure of another thro' such other person's fence, the owner may enter to take them

out. but if they broke in through the fence of the owner of the Cattle, he could not justify such entry — One may enter upon the possessions of another for the purpose of preventing a felony, if he has reason to think that a Crime of that magnitude is about to be committed — So too when there is a breach of the peace actually committed, one may enter upon the possession of another for the purpose of quieting the tumult — In these cases the house as well as other inclosures may be entered — One may cross another's ground if he can not avoid it without great detriment to himself, & if in so doing he happen to commit an involuntary injury, it is said Case & not trespass is the proper remedy — For injuries done to the property of the Wife, she is to join in the action only in Case where the injury is of a nature to affect the inheritance The Master is liable for the trespasses of the Servant, when committed in his immediate business or by his direction — & yet the Servt. may be made liable for such trespass, if the injured party choose to make him so, instead of calling on the Master this is often a hard case, & some of the authorities seem to countenance a different opinion, but the current of them go to establish the indiscriminate liability of the Servt. in all cases — In Eng. there is a Stat. permitting a tender of amends in case of an involuntary trespass. but in Conn. we have no such Stat. nor practice —

Of Trespass upon Real propy

In Conn. there is a Stat. relative to trespass upon the … the provisions of which are very sever against … trees, subjecting the person guilty of such trespass to treble damages & a penalty $1.67 for every tree a foot over & half that sum for each one of a less bulk, to be recovered by an action on the Stat for if the action be not expressly founded on the Stat; or if the proof according to the requisites of the Stat. be not made out, a recovery can only be had for simple damages, as at Com. law — 3d. it is a rule in law that when there is a com. law remedy & a Stat. remedy, adding a penalty, & an action be founded on the Stat & fail for want of Stat. proof, still if there be sufficient com. law proof judg. will be rendered as at common law for the simple damages — this however is only in case of ~~the~~ a Stat. giving a pen… our Stat. has been construed to reach only volunt-ary, wilful trespasses, & not such as are commit-ted through ignorance or mistake — Our Stat among other things provides that a person setting fire upon his land shall be liable for all conseque-ntial damages to others, this however is but in af-firmance of the Com. law; for by com. law any one setting fire even upon his own ground, in an impru-dent manner, whereby injuries accrue to his neighbor, is liable for the consequences — & the Stat can not reasonably be construed to mean anything more The mode of proof authorised by our Stat. is singular & entirely

-nary – the Pltff is not only allowed to swear to the fact of the trespass being committed, but also, that he believes that the ~~pltff~~ Deft committed it – (but may not positively testify that he did do it altho' he know the fact) & then may from other quarters if he can make it appear probable that he is guilty, upon which he shall be deemed to be so, unless he will swear that he is not, which if he will do, it is conclusive & judgt must be given in favor of the deft. & the Pltff must pay double costs – but the common law mode of proof is most usually pursued – When the deft. in trespass, whether upon the Stat. or not, if before a just. of Peace, pleads title, no further proceedings can be had there for the just. to take a bond of the deft. in the penalty of $70 to pursue his plea & bring forward a suit in the County where the land lies, for the trial of the title – This bond is not to secure the damages in case he fails, for if he do fail upon the trial the bond is saved by having pursued his plea – but if the Deft change his plea to a different kind of justifi-cation, or to not guilty, the bond is forfeited – the bond is merely to prevent the defendants putting in a false or vexatious plea – The mode of pursuing the plea is to take out certified copies from the justice & enter them in County Court docket, & not in just. to commen-ce a new suit – unless the just. live out of the County in which the plea is to be pursued, in which case an action must be brought

Of Trespass upon Real propt.

It generally has been & still is a rec.d opinion among many that a determination of the title in this way, when specially put in issue would be a bar to an after action of Eject. for the same premises: the Sup.r Court have, however, resolved that a judg.t in such action is no bar to one of a higher nature — & again they have since resolved that such decisions a bar to an eject.t — & now the Law is, ergo queue —

Com. Law — An Officer under a civil process can not jus. breaking an outward door unless he has previously taken the Deft. & he has escaped — But in case of a warrant to arrest one on a criminal prosecution, outward Doors may be broken — But after an Officer has peaceably entered the house he may proceed to break inward doors as well upon a civil as criminal prosecution —

A man's house is an asylum only for himself & family whether minors or not, if they are a part of his family & have no other dwelling — but one can not safely protect any other from arrest in his house & if he attempt it an Officer may break even his outward doors for the purpose of arresting such protected person even upon a civil suit — If an Officer unlawfully breaks the outward door & after makes an arrest it has been a litigated point whether such after arrest would be good — In Semain's case such lefty was holden good the trespass of the Off.r notwithstanding, but the contrary seems to be the doctrin in Cowp. 1st & in support of the latter opinion see a Case in the Exche.r in 2d vol Bac. Abr. 73

Semain's Case 5 Co. — Cowp. 1st

Of Forceable entry &c

At common law, when the owner of the freehold had a right of entry, as in case he had been disseized, or the tenant held over, or in any other way the person out of possession, ~~being~~ had the right of possession, he might enter even by force to recover his possession. & such entry would be good, & the person making it liable to no penalty— But by Stat. as early as the reign of Eliz. the right of forceable entry was taken away, & made penal; tho' a peaceable entry is still lawful— To constitute the offence of a forceable entry there must be an actual violence, as breaking doors or the like— or it must be done in a manner, or accompanied with words calculated to inspire terror— & it must also be for the purpose of making an entry & upon the premises for the purpose of taking possession— And for such offence all who are aiding or abetting are indictable as principal offenders & punishable by fine—

A forceable detainer may be in two ways as, first, where there is a forceable detention after a forceable entry; & secondly when the entry was permissive, but the subsequent detention forceable— this too, is a public offence— If one enter

~~his house, of which another is in possession & turn him out,~~ & turn him out, if the person so ousted attempt to ~~re~~ reenter by force & violence both will be guilty of a breach of law - the one of a forceable entry & the other of a forceable detainer - But as between the parties the one who has the right of peaceable entry making a forceable one does not become in an action liable to the person turned out, tho' he is inditable for a breach of the peace; for the person turned out having no right to the possession is not injured; & tho' the law has been violated in his person yet he has no private action for damages - tho' generally speaking where the law is broken by any act to the person of another such person has a right of action for private injury - Yet to prevent the frequent happening of tumults of this kind the Stat. has provided that all forceable entries shall be of no avail & the person turned out may by applying to a justice of the peace have a jury of inspection to ~~try~~ try the simple fact, whether the entry & ouster was forceable or not, without paying any regard to the title, & if ~~they~~ find ~~that~~ there was, they will find for the complainant, whereupon the complainant is immediately put into possession - But in case of a mere simple forceable detainer unaccompanied with

forceable entry this mode of relief is in applicable; for if the person so in possession without force plead Haw. P.C. 224 - plead title the Just. can proceed no farther -
Our Stat. in Conn. makes a like provision in cases of this kind, treating the forceable entry & detainer as a public offence, punishable by fine & finding sureties for good behaviour; & also gives the same remedy of reseizin to the party forceably dispossessed, by application to a justice of Peace who by warrant to the Sheriff or Constable may cause a Jury of Eighteen to be impannelled, or at least fourteen if no more appear (eighteen being summoned) - & this in Conn. language is called a freeholder's Court - The words of our Stat. in giv-ing the right of reseizin, blends the case of mere simple forceable detainer, with that of forceable entry - but this can not be the meaning & such have been the determinations upon the Stat. for in such case the party agrieved must have recourse to his action of ejectment -
In case of the real owner of the land who also was entitled to the possession at the time, being thus forceably turned out, our Stat. gives him treble damages -

Of Waste

At Com. law none could commit Waste but tenants for life by operation of law as tenants in Dower, by Curtesy &c. but through the intervention of Stats. at a very early period all tenants of a less estate than a tenancy in tail, except the tenant in tail after possibility of issue extinct, were made liable for waste. So that all tenants for life or for years whether by operation of law or by convention, are now liable for waste, tho' mere tenants at will are not — The Stat. subjects the tenant who commits waste to treble damages & a forfeiture of the place wasted - These Stats. were made at a time when the Eng. Stat.s are considered equally binding with the com. law in this State & yet in our actions of this kind it has been customary to give only simple com. law damages - this however seems to have passed sub silentio - & it is uncertain what would be the determination if the treble damages should be demanded - But if the com. law remedy is to be adopted in Conn.t it should seem that the whole law must be adopted together & yet according to ~~that~~ law, only tenants ~~by~~ for life by operation of law as tenants in Dower, by the Curtesy ~~would be~~ are liable — Waste may be committed in any part of the freehold — To pull down a house

Co. L. 53. however bad is waste - if it be injured by accident as by lightening &c. it is not waste, but if the tenant do

repair it — he will be punishable for waste, unless he expressly stipulated to the contrary — To take away any thing which is firmly fixed to the freehold is waste — If a house be decayed when the tenant enters it, he is obliged to do no more than
2 Rol 818 keep it in the same condition — but if it fall down or he pull it down, he may not in rebuilding enlarge the house, for if he does, it is said to be waste; nay
2 Ld 3 it is said, if the tenant build a new house where there
2 Rol 815 was none before, it is waste — To change one building into another, or arable land into meadow,
Co. 6/32 or meadow into arable land, is waste —
2 Rol 814 It has been decided that turning pasture into arable land is such an amelioration of the land as not to be deemed waste — Mere bad husbandry in itself is not waste — Not only cutting timber trees (except for necessary repairs) but also such trees as were for ornament only, is waste — So too the cutting of com-
Rol 820 mon under wood while growing, for fuel, is waste if there be dry wood enough for that purpose — It is not probable ~~that~~ all these severities would be adopted in Conn. in respect to what should be deemed waste — A tenant must keep the premises in repair unless he expressly stipulate otherwise, but for ~~that~~ purpose it is lawful for him to make use of the timber growing on the land unless the

Of Waste -

Waste lies by default of the tenant, in which ca
Rol. 822 he would not be allowed to use the timber grow
on the land - But when the tenant takes the timb
growing on the land for the purpose of repairs,
must use that identical timber; for if he sell
it & with the money buy other timber & repa
Co. L. 53 the cutting & selling will be considered waste -
If the lessor reserve the timber in his lease, th
lessee cannot take it for the purpose of repa
even - but yet, if he do cut it he is not lia
in waste, but in trespass; for a person is no
liable in the action of waste for the destruc
-ion of what he has no title to the possession
of - A Lease may be made without impea
-ment of waste, in which case no action of an
kind ~~case~~ lies for waste committed by the tenant un
-less it be wanton & malicious, as throwing down ho
-ses, cutting the shades about the walks &c, in
which case Chan. will interfere not only to dec
P. Wms. 528 a recompence, but also to inhibit a further co
3 Atk. 216 -mission of such enormities - but at Law th
2d Bro. Ch. 89. is no remedy in such case - The tenant is li
Co. L. 54 ble for all depredations committed by a stranger -
If the assignee of the Lessee commit waste, the re
-mainder man or reversioner may sue which
will, but after electing to bring his action of waste a
-gainst one of them, he cannot afterwards prosecu
the other, tho' he get nothing from the first - If it be

Of Waste

Exr. of the Lessee who commits ~~the~~ waste, he is liable. This action lies only for the immediate remainder man in fee, & not for a subsequent remainder man, nor even for the reversioner, when there is an intermediate remainder man for life, neither can such remainder man for life have the action for it is uncertain whether he will ever come into the possession – & yet Chan. will interpose in favor of such remote remainder man or reversioner & inhibit the waste, & that even in favor a contingent remainder man in some cases – + When waste is committed sparsim, the whole grove, or field is forfeited, for it would be nugatory to adjudge only the particular spots forfeited – Waste is a personal action & cannot be maintained against the Exr. of the person committing it – & even in a case where the husb. was siezed in right of his wife, & commits waste, & then the wife dies, the husb. cannot afterwards be charged in this action – Perhaps in a case of this kind if the assets in the hands of the Exr. were benefited by means of the waste of the testator an action of some other kind would lie against the Exr.

Co. Lit. 54 – 1 Vez. 555. 524. 546. – 2 Ld. R. 828

A tenant by elegit is not liable for waste because he is ~~not~~ liable to account for the profits, & so for all the profits he takes in that way off from the land – The same principle extends to mortgages where the Mortgagee is in possession: & yet Chan. will inhibit either him or the Mortgagor, as the case may be, from

committing further waste — A trustee com-
-mitting waste is not liable in an action at law
for in him is the legal estate; yet Chan. will re-
-strain him & decree him to account for the waste
Co. Lit. 777 done — A tenant at will is not liable in waste
There have been few actions of waste in Cont., & it
is by no means that all the rigor of the Eng. doct-
-nes upon this subject would be adopted by our Courts

No tenant may open new mines upon a free-
-hold estate, but may work such as were pre-
-viously opened — & tho the lease in terms passes all
2 P. Wil. mines, it is construed to extend only to opened mines
242 unless new discovered mines be expressly mentioned

Of Nuisance —

Nuisances are of two kinds public & private — A public
nuisance is an indictable offence but no action lies by
an individual in such case unless he sustain a
particular injury, in which case an action lies —
A private nuisance is not an indictable offence, but
the person injured may enter peaceably & abate
it, or may bring his action for damages — & if the
nuisance be continued he may have a further remedy
by action for such continuance until the nuisance
be removed, recovering damages only up to the time
of bringing the action & not consequential damages
because he may have a new action for each continu-
-ation — Actions for a Nuisance either public or private
is always actions on the Case — The Eng. law also gives a
compulsory process for the final removal of the nuisance
when the party causing it is obstinate; it is either by an assize
of nuisance, or a quod permittat prosternere ——

Of Ejectment—

Ejectment was formerly used for no purpose but to reco-ver a term for years. & it is comparitively of late date that it was made use of to try the title to the freehold— The process to do this, is in Eng. entirely fictitious— A. the claimant makes a lease to B. who may be a fictitious person— or at least it must be stated in the Declaration that such a lease was made altho the ceremony may be in fact omitted. B. the lessee who is the nominal Pltff is stated to be ejected by C. the casual ejector— C informs D. the real possessor that he has no title. & that if he (D.) does not defend judgt. will go in favor of B.— & the operation of it in case of a judgt. is, that the Sheriff is by his warrant or writ in eject. to turn out not only the defts. but every other person found in, & give possession to the Pltff to save such judgt. & its consequences. D. the owner or possessor will come in & move the Court to strike out the name of the casual ejector. & insert his upon the record as deft.— this the Court do on condition of D's confessing Lease, entry & ouster, so that the fiction as to them can not be questioned, & the title of the land being the only thing in question if B. the lessee, can make out a title in A. the lessor, paramount the title of D., he will have judgt.— But this suit being in the name of the lessee always, & therefore to recover nothing but the term, the claim-ant A. therefore if he wishes to make a second trial having a verdict against him in the first, has only to make another feigned lease to some other person & may thus

Of Ejectment

bring another action, & the Record in the former suit can not be pleaded in bar as the names of the parties upon the Record being different. so that if the claimant be obstinate he may bring as many actions as he thinks proper — If the possessor (D. in the case put) after getting his name inserted in the Record refuse to confess lease, entry & ouster, the Pltff must as to him be nonsuited; but the Court will then insert the name of the casual ejector & judg.t will go against him, the consequence of which is that the possessor D. & all others will be turned out of possession by force if they will not go peaceably on an Execution empowering the Sheriff to break doors — It is a gen.l rule, admitting of a few exceptions only that incorporeal hereditiments

Cro. C. 492. cannot be recovered in this action —

It is an invariable rule in Eng. that none but such as have a right of entry can maintain this action, & yet it does not appear that any other action has been made use of for a century past for the recovery of the freehold; & still there must have occurred numerous instances in which a person has the right of property where he has not the right of entry for if one who has no title be in by adversary possession for twenty years. he has thereby got the right of possession, & if the owner of the property

2 Ray. 740 turn him out. such holder by right of entry may bring his eject. to regain possession, & subject such owner to

trouble of having recourse to his action of novel disseisin, or some other real action to gain his prop[er]ty. So too, if a disseisor die in possession, & the descent is cast upon his heir, the right of entry is thereby taken away — It has been a question whether the Mortgagor can ever gain such a possession by length of time as will bar the mortgagee's right of entry, & it should seem not, for he is in nature of a tenant at will who never can gain such right, his possession as
Cow. 271 well as that of the Mortgagor being not an adversary one — When two claim land through the same title, the possession of the one will not be deemed adversary to the other — In Eng. the declaration in this action must not only state the bounds of the
11 Co. 65. land & quantity, but also the quality, as whether meadow &c. In an action of Eject^t the Pl^ff recovers nothing for the mean profits but only nominal damages for being turned out — But having by this action got into possession, the disseisin or dispossession is purged, & he may then have his action of trespass for the mean profits, which he could not do until he had regained the possession & thereby purged the disseisin — If the real owner bring this action of trespass for the mean profits he will recover for the whole time he was held out — but if it be brought by the lessee who was only the nominal Pl^ff in the Eject^t, he can recover only from the date of his lease

Of Ejectment

In Conn.t our action of Eject.t is a real action & has no fiction about it – the claimant brings his action directly against the one in possession & the real names of the litigants being thus upon the record, one trial is effectual & no subsequent action can be maintained, unless the circumstances of the claim have been varied, as if the title of the claimant ~~was~~ defective at the time of the first suit, is afterwards perfected, or the Pl.ff fail to prove the deft. in possession in such first suit or the like – In Conn.t the right of possession is to this purpose, considered as possession. & there is no actual entry necessary before commencing the suit – But by our Stat. of limitations, fifteen years adversary possession, peaceably held bars all right of entry, & our right of entry being commensurate with the right of property, all right is consequently by such possession extinguished & the title wholly gone – To this Stat. there is a proviso in favor of Infants, feme Coverts, Non compos, those imprisoned & beyond sea at the time their title accrued, of 5 years after the expiration of s.d fifteen years –
If two claim the same land but neither be in actual possession, the one who wishes to have the question of title decided cannot have an action unless the other take possession; but he may himself go into possession & thus compell the other to bring an action or lose the land by operation of the Stat. of limit.ns

or again. if the party who wishes to ly by commits the least trespass upon the land, the other may sue him either in trespass or ejectment — if in eject^t. the Deft. must either come forward & try the title, or else disclaim all title, in which case the Pl^ff will be nonsuited, but the disclaimer of the Def^t. being upon record, if he ever after intermeddles he will be liable in trespass & if he would plead title he is estopped by his disclaimer on record — Our declarations in Ejectment are simple only stating that the Pl^ff was seized (or possessed if he claim under a lease) within fifteen years, & that he was ejected &c, giving the boundaries of the land quantity &c —

It has lately become a question among lawyers whether an action of trespass for mean profits will lie in this State after possession gained by ejectment the reason of the doubt seems to be this, that as the right of possession is deemed to many purposes the same as possession, & if it be so for the purpose of maintain trespass; why not suffer the same effect to be produced in the action of disseisin by suffering the jury to assess the damages in that action for the mean profits as well as for the ouster, that would be produced by bringing two actions? — When the Pl^ff in Eject^t. dies after judg^t. & before execution — the heir may have a Scirefacias to have execution done in restoring the land — & the Ex^r. to have Execution renewed for the Cost &c

Of Slander

Slander is divided into words in themselves actionable, & words which are not actionable except from actual consequential damage—

1st. of Words actionable— & here it is immaterial whether any damage be sustained or not & it is not necessary nor usual to state any special damage in the declaration— but if special damages are stated they must be proved— in order to recover for the special damage alleged— This kind of Slander is divisible into four heads— 1st. all words which charge a man with the commission of such crimes, as would subject him to corporal punishment, are actionable— but it must be a charge of an actual commission, & not merely having a disposition to do it— It is not the scandalousness of the offence, nor the disgrace affixed to it in the opinions of men ~~that~~ constitute legal Slan[der] but this is the criterion, is the person charged if guilty of the offence imputed to him, punishable corporally In Eng. to charge a man with committing adultery is not actionable, because there, adultery is not a crime cognizable in the temporal Courts, but in Cont.— such a charge is actionable because, by our Stat. adultery is penal— the principal is the same in both Countries

2dly Such words as affect a man immediately in the business by which he gets a living, are actionable as to call a Physician a quack, but to call him a kna[ve]

would not be actionable — but to call an atty a knave would be actionable — so to say that a tradesman is ignorant of that trade by which he lives, is actionable — so too to say of a Merchant that he is a bankrupt —

3.dly Words which affect a man in his official character, when spoken of him in reference to ~~his~~ the exercise of his office, are actionable — as to say of a Just. of Peace with reference to a judg.d he had rendered, that he was a fool or a blockhead &c, or that he acted knavishly therein would be actionable. but to speak of him without reference to the execution of his office & call him a beattle-headed justice (for instance) is not actionable —

In Eng. a distinction has been taken between slandering a man in an Office which is lucrative & one which is merely honorary — to speak of one in the former as wanting integrity or capacity is equally actionable, but in the latter case such words only as touch his integrity are actionable — but it is presumed that no such distinction obtains here —

4thly To charge a man with having a disease which would banish him from society, is actionable — but this must be spoken of him in the present time; for to charge him with having had such a disease is not actionable —

An action in these cases will not lie, unless the words be false & malicious — & this must be stated

in the declaration — & to prove that the words were not false & malicious is upon the Def. for this, if the words were spoken, is a defence but ~~unless~~ their falsehood & malice will be presumed if not disproved — Malice in legal language conveys not precisely the same idea, as in common language — any thing which is done from a wicked, or corrupt motive, from an unsocial heart is maliciously done in a legal point of view altho' there be no ill will harboured against the person injured: as to murder a man to get his money — & in case of slander if the words be spoken through mere wantonness, or through a carelessness of the reputation of another, it is through wrong motives that they are spoken, & therefore in a legal point of view they are maliciously spoken —

To charge a man with having committed a trespass for which the punishment is by fine only, is in some cases, tho' not generally actionable — & from an examination of the authorities the rule to be drawn from them seems to be this — If the trespass charged ~~was~~ be of a scandalous kind & such as would fix a stigma upon a man's reputation, tho' by law punishable with fine only, yet is the charge actionable, as to charge a man with stealing another's corn from his field, which is but a trespass in law — But if the trespass charged carry no disgrace with it as trampling down the grain of another in hunting, &c the ~~not~~ charge is not actionable —

Of Slander

As to actionable words, in general it is to be observed that it is no occasion to have spoken the words guessing-ly- or by way of hint, or adjectively, provided the idea conveyed import a charge of having committed the fact
Hob. 18 But for the mere expression of ones opinion, if the words
2 Wils. 300 be so spoken that it is evident from the connexion
Ib. 18
2 Stran. 142 that the meaning of the speaker was not to convey the idea of a positive charge, but only an opinion that he had a disposition to do it, no action will lie-

If the charge be of what is to all to be notoriously false, so that it is known & evident to all that the charge cannot be true, nor the person charged, be guilty of a punishable offence, as that I.S. has killed his wife when she is alive and about, it is not actionable - again if one charge another of being a thief or a murderer or the like, but the words be used in such a manner as entirely to explain away all idea of their being punishable offences, which are so termed- as if one say of another, he stole trees, or murdered hares, no action lies-

The second kind of Slander is where special dam-age has been sustained, & for the recovery of which the action is brought- & in this case the special dam-age must be laid in the Declaration & proved- In actions of this sort it matters not whether the words be actionable in themselves or not, for the damages really sustained are the object of the suit- in order to entitle to a recovery the words must be false, but it seems

not so well settled whether they must be malicious. When one is injured in his person or property by the mere carelessness, or negligence of another without any ill intention on his part, an action lies for the injury: in analogy to this principle, it should seem that words spoken without malice, if false & actually productive of injury, would be sufficient foundation for an action but this analogical reasoning may not be admissible & the point is at best doubtful — After proving the words laid in the declaration, it is admissible to prove other words by way of agravation & to shew with what temper the words laid were spoken, provided such other words were not in themselves actionable, for if they were an action lies for them & if allowed to be proved in both actions a double recovery would in some measure be obtained — Words of heat & passion say the books, are not actionable, but this is far from being strictly true — for this circumstance is not a sufficient excuse for the utterance of actionable words — & anger if causeless is no mitigation of damages — but if the Pltff give cause of anger, or there exist such causes as might reasonably be supposed to excite anger, it is a cause of mitigation, or as the case may be of acquittal — There are several cases mentioned in the books under the head of special damages, where tho' no special, immediate damage was proved, still a recovery was had; but upon an inspection of the cases they seem most if not all of them referrible to the head

words actionable on account of their tendency to injure a man in his person, profession or occupation
Rol. 281 by which he gets his living – Of this kind is the Case in which one represented the house of another, who was an innkeeper, to be infected with the small pox – So
1 Rol. 694 too, the case of calling a Clergyman a heretick, & charging a Maltster with cheating & being a cheat in
2d Lev. 62 a conversation relative to his dealing in the trade of Maltster.
4 Co. 17. So calling one a bastard has been held in actionable; this case seems not referrible to any particular head – in the case, it is said, it may cut him off from a possible inheritance ——

No words used by a Lawyer in any legal proceedings either in the pleadings or argument, if they were in any way relative to the case, are actionable: but if a Lawyer takes that opportunity to charge a man with the commission of crimes, which charges have nothing to do with the case in hand, it is actionable – So too, if he makes use of words proper to his case, but arraign him before a Court that has no jurisdiction of the crime – Nor may a Party or a lawyer declare abroad what they have alledged in their plea, & assert it to be true – There is no such thing as joint Slander –

At one time it was the rule of Courts to construe words in their most rigid sense – & at another, in their mildest sense – But now the two extremes are avoided & the rule is that they are to be understood as they would be in common conversation ——

Of Slander

In Eng. oral Slander is not indictable – In
Conn. we have a Stat. which tho' it does not seem
to make it an indictable offence, yet it gives the
injured person a qui tam action instead of the com.
remedy, & by this mode the person guilty of the Slan[der]
is finable ten pounds to the public – There has
been no instance of a prosecution upon this Stat.

Libels – When a person is charged in a
writing with any action, which if the words had
been spoken would entitle ~~the person ing.~~ him to an
action, he may for such written slander have an
action – Not only so, but there are many cases in
which the words if spoken would not have been
actionable in themselves, yet if made public by
Pop. 139 Hob. 216 writing are actionable – as any thing which tends
2d Wils. 403 greatly to insult, provoke, wound the feelings or honor
2 Burr. 980 – of a person, or to destroy the peace of ~~the~~ a family –
& an indictment as well as a private action in
such cases will lie –

In a private action for a libel proving the truth
of the words is a sufficient justification – But by the
laws of Eng. the truth of the words is no justification
against a public prosecution; for the public tran-
-quility is often as much endangered by the publi-
-cation of scandalous reports when true as when
5 Co. 125 false – A libel upon the character of a dead per-
-son is an indictable offence – for the ill temper wh[ich]
such publications ~~occurs~~ may occasion among the

relatives of the deceased is as dangerous to the public peace often, as the slander of the living — No private action however lies for such an injury —

Cow. 672. Reflections on Government are punishable as libels

The publication of an obscene Book has been adjudged a

Stra. 788. libel — So too publications against the established reli-

834 2 Ld. Rp. 196 — gion are libels —

There are three direct defences against the action of Slander — The first is that the words are not actionable — 2dly that they are true — & 3dly that they were not spoken — In the first case a Demurrer is the proper defence — In the second the Eng. mode is to plead the truth of the words specially, for the truth of the words cannot be given in evidence under the genl. issue — In the third case the defence is by plead-ing the genl. issue which in this case is not guilty — In Conn. the two last defences are blended & the genl. issue pleaded, so that here under a plea of not guil-ty the truth of the words spoken or written may be given in evidence, & this is not only admitted by Stat. but is always practised — N.B. now by rule of Court in order to prove the truth of the words, Deft. must give notice to the Pltff in writing of the facts intended to be proved on trial, or he cannot be allowed to prove them —

The first averment in the declaration in this acti-on is that the Pltff was of good reputation & has never been guilty of the crimes by the Deft. imputed to him — in the next place the words spoken must be recited & averring that they were false scandalous & malicious, many other words are usually made use of; but the statement of their being false, & being maliciously spoken, is indispensable

& there must also be an averment that they were spoken in the hearing of some person or persons, as ex gra., in the hearing of diverse Citizens of this State – The use of innuendos is to explain & identify the meaning of the words spoken & shew their application to the person, & subject of the conversation but are not admissible to extend the evident & natural meaning of them –
4 Co. 20 –
In the case of actionable words the genl. damage only is stated, tho' no proof is allowable of actual damage – But if the action be for special damages, they must be so specified ~~that~~ they can be proved –
In the case of actionable words which affect a man in the profession or occupation by which he gets a living, it must be stated that the Pltff was then in the occupation &c – If ~~it~~ the words be spoken of a Majestrate – the declaration should shew that they occurred in a colloquium concerning his official conduct & with reference to it – In case of a libel it must some where appear on the face of the declaration, that it was published –
In pleading the truth of the words spoken as a defence, the proper mode is to alledge that they were true & shew in what they were true – yet it seems to have been holden in some cases that to say they were true is sufficient. sed quære.
1st Ter. Rep. 748
When a Lawyer is sued for words used in legal proceedings, his proper defence is a plea setting forth

Co. J. 91. the occasion of speaking the words & alledging that they were pertinent to the case — Formerly the law was so in Eng., that under a plea of the genl. issue the truth of the words might be shewn in mitigation of damages, tho' not in justification, but lately it has been resolved otherwise, & the truth is Stra. 1200. not allowable even in mitigation — In Connt. the truth of the words may be given in evidence under the genl. issue as well in justification as in mitigation — But when words not laid in the declaration are proved to shew the temper of mind in which the principal words were spoken, the truth of such un alledged words may be proved to do away their impression, for the Defdt. had no opportunity to choose his plea with respect to them — When the words stated in the declaration are not actionable, tho' the Deft. plead issuably instead of demurring, & it be found against him, yet he may get rid of the verdict by means of a motion in arrest —

The collateral defences to this action are, first — a former recovery; for any damages sustained by means of the words after a recovery, however great they may be, are no cause of another action — In Connt. as well as Eng. this ~~must be~~ is plead specially & the whole record set out either verbatim or substantially — & tho' in Connt. the Stat. would allow of its being given in evidence

Another defence is accord & satisfaction; in pleading this plea, not only the agree.t to receive but the actual reception in satisfaction of the thing agreed to be given, must be set forth, & it
2.d o. 98- must be something having a market value -
Another defence is the Stat. of Limitations - in Eng this is two years, but in Con.t it is three years from the time of publishing the words, & that whether the Pltff knew of the Slander or not - But it has been adjudged in Eng. (& doubtless our law is the same,) that the Statute limitation respects only actionable words, & does not extend to prevent the bringing of actions for special damages, for such damages may not occur untill the elapsing of the time set in the Statute -
Another defence is a Release, i.e. a release in writing from the Pltff - & this being the act of the Pltff. it must in all cases be pleaded specially even in Con.t; such plea may either recite the Release verbatim, or set out its substance -
Another good plea in bar of this action is an award - in pleading which it is requisite to set forth a submission & award made, & that the Deft. has performed the award on his part, if by the terms of the award, the time of perform-ance had come - In a Declaration in this action many sets of words, spoken at different times may

be alledged: but it is a rule of law that when the jury in such case, find a gen.l verdict & damages entire in such case, & some of the sets of words are not actionable, & others are, that judg.t will be arrested for it can not be known in such case, from the re-cord, on which count the verdict was founded. But if each set of words set forth, contain some words which were actionable judg.t will not be arrested, altho' some of the words in each were not actionable. The def.t is at his election to ~~separate~~ sever the defence, by pleading dif-ferently to the different sets of words or counts in the declaration, or to the different words in the same set, as to demur to the one & plead the gen.l issue to the other, or a justification as the case might be.

(1 Vo 130)

Of Malicious Prosecution.

An action on the case lies for the recovery of damages for being injured in fame, person or property by means of a false, groundless & malicious prosecution either ci-vil or criminal. Firstly, as to civil suits. The ~~Rule~~ general rule is that when ~~that~~ the Pl.ff fails in his action he is not merely because he was mistaken in his action, lia-ble to this suit. but those cases when this action lies ~~are~~ by way of exception to the gen.l Rule. as 1.st where the Pl.ff in the vexatious suit knows that he has no ground of action; as when there had been a former recovery, or a

(Sal. 13)

suit then depending for the same cause; or when he knew that there never did exist a cause of action, which fact is provable from his confessions, or other positive & undoubted evidence-

Hob. 205 266 sed contra Gilb. Law & Equ. 162

2dly When one has a good cause of action, but pursues it in a malicious & unnecessarily vexatious manner, as if one for a 20 dol. debt hold the deft. to bail or imprison him

1. Sid. 224 1. Saun. 228- upon a demand of 500 dol. knowing that his demand was thus exorbitant-

3dly When one sues before a Court which has no cognizance of the Cause, knowing it to be the Case- for if it was

2 Wils. 302 done through ignorance this action would not lie-

4thly When one by fraudulent management gets judgt against another without his having notice of the suit, this action lies, & that too whether he had a just claim

1. Ventr. 86. 1. Lev. 292- or not against him whom he so obtained such fraudulent judgt-

5thly When one sues in the name of another without his direction, this action lies, & that too altho' there was a just cause of action in favor of such nominal Pltff; but in this case such interference must have been a malicious & wanton one, & not an interference merely out of friendship to such nominal Pltff to secure his demand against a fail-

Sal. 14. -ing or doubtful debtor-

The action for a malicious or vexatious suit, must not be brought untill there is an end of the suit of which it com-plains either by judgt of court, nonsuit, disappearance, with-draw, or some other way- The suit complained of (or the

Esp. Di. 527 Bul. N.P. 13- proceedings with it in cases of that kind) must not only be mali-cious but actually groundless, & some damages either ac-tually incurred, or inevitable- This is a Com. law action,

but in Conn.t a Stat. has been passed upon the subject & without taking away the com. Law remedy, hath under the name of a vexatious lawsuit, given another & further remedy of treble damages & a fine of 7 Dol.s —

Secondly this action lies for a malicious crimin-al prosecution, i.e. against any private individual who shall cause ~~another~~ an innocent person to be indicted without cause & through malice, or against any one who should in like malicious & groundless man-ner aid & assist in the promotion of such prosecution —

4th Bur. 1974 but such prosecution must be both malicious & with-

1. T. Rep. 544 -out probable cause or no action lies — From the want of probable cause, malice may however, be impli-ed, & most commonly is; but proof of the most express malice is no proof of the want of probable cause, & therefore is not of itself sufficient to support the action — So that a man may from a malicious motive take up a prosecu-tion; or he may from circumstances of apparent guilt without malice pursue a prosecution; & if there be the least probable cause in the former Case, or no malice in the latter, an action will in neither Case lie against him — If the Pl.ff in a Case for malicious prosecution prove his acquittal upon ~~trial of~~ the indictment the Law ~~will~~ ~~presume~~ prima facie presumes malice in the Def.t; but this may be rebutted, & is no more than throwing the onus probandi, upon the Def.t, who if he

1st Wils. 232 can make out the least probable cause, ~~as if~~ thereby

1st Ter. Rep. 493. wipes away such presumption; & the finding of a Bill by the Jury is said to be sufficient for this purpose, & perhaps the binding over of the [illegible]

When there is both malice & want of probable cause this action lies in the following cases (viz)

1st When the indictment of the Pltf in the prosecution complained of, tended to scandalize him & injure

Sal. 15. his reputation — 2dly if the indictment put him in any peril of life or liberty or brought him in dan-

Ibid — ger of any corporeal punishment —

3dly If the indictment in fact subjected him to loss of property, this action lies, tho' his person & reputation

Stra. 977 remained unaffected —

It is necessary to the maintenance of this action that the prosecution complained of is in someway at an end, as by judgt., noli prosequi, quashing or the like,

Doug. 205 & this must be stated in the Declaration — this action is supportable notwithstanding the indictment com-

Stra. 1691 — plained of was so defective that no judgt. could be rendered

Gil. Law & Eq. 185. against the party indicted, nor any conviction be had upon it —

There is this singularity respecting the Evidence in this action — that to shew that there existed probable ground of suspicion against the person indicted — the Deft. himself, or his wife, or other interested person is permitted to swear that the offence ~~for which~~ was committed, for which the indictment was preferred, but no further —

There are but two direct defences to this action, towit: not guilty, & a justification — a justification might in Cont. be given in evidence under the genl. issue, but in Eng. it must be by special plea stating the causes & grounds for the prosecution of the Pltf in the indictment or

action complained of, & indeed the substance of the whole proceedings in such prosecution or suit – The collateral defences in this action, such as accord &c are much the same as in an action of Slander – When the Pltff in this action has proved his acquittal upon the prosecution ~~continued of~~ complained of, he has done enough to cast the probability of guilt upon the Deft. but in order to strengthen his case & enhance the damages the Pltff may ~~at~~ first go
Black.Re. on & prove all that he proved in his own exculpation
385. upon the trial of the prosecution or suit complained of.

When several are joined in the same action for this injury, the question whether the jury can sever ~~them~~ & apportion ~~their verdict~~ damages by their verdict
1st Stra. 79 has been differently decided: but the better opinion
2d Stra. 910. is that they can not apportion –

It is to be observed that where the whole proceedings upon an indictment are coram non judice, the circumstance of the Justice's binding over, will be not the least justification to the instigator of the prosecution; but otherwise it would be if the Justice had a right to bind over –

The Pltff in this action, must in his declaration state, in substance the whole proceedings in the action or indictment complained of & shew wherein the injury as well as the illegality consisted – Malice being the gist of this action
Bur. 1972. the actual damages sustained are not always the rule for the damages given – –

Of Trover

The action of trover lies for the taking & conversion of personal property in the three cases following. towit.
1st when the taking was tortious; & in this case tho the goods be restored before the action is brought, still the right of action remains, & no other effect is produced by such restoration than that of lessening damages — for in such case damages are given for the taking & detention only, & not for the value of the article — but when the goods are not restored, their value is commonly estimated as the true rule of damages, tho' in certain cases something more than the market value is allowed.
2dly The second case where trover lies, is when the taking was lawful as by actual finding or bailment, but such finder or bailee makes an improper use of the goods found or bailed, as by selling them, or using them contrary to the terms of the bailment, & so exceeding the purpose of it: here the wrong is in the misfeasance only —
3dly The third case in which trover lies, is when the Deft. came rightfully by the goods, & uses them properly, but yet refuses to deliver them up when requested by the owner — if however the bailee was not bound to deliver up the goods, as if he had a just lien upon them, then no action will lie for refusing to give them up — & again if one find a chattle, any article as & it is claimed by a stranger the finder need not give it up untill satisfied of the justice of his claim —

Of Trover.

So again, if the bailee or finder, have a just & legal claim for his expences & trouble concerning the article in question which will create a lien upon it, he
1 Burr. 423 will not be liable in trover for not delivering
1 Ray. 752. the article untill such due is paid or tendered –
In the third Case when trover lies it is necessary
1 Ld. Ray. 264 to prove a demand & refusal, but not in the
Cro. Eliz. 495. two former Cases – For in the first case the tortious taking is a conversion, & other proof is not necessary – & in the second, the disposing of the propty, or the exceeding the terms & purposes of the bailment is a conversion. But in the third case. to wit. that of a wrongful detention of the property only, there must be a demand & refusal, which in law is deemed evidence of a conversion –

To support this action there must be some kind of property either general or special in the Pltf – Whoever has the special property may bring this action – There must also have at some time ~~been~~ been a possession in the ~~Pltf~~ Deft. tho' it is not necessary that he should have the possession at the time of bringing the action –

Where a demand is necessary to support the action it is merely matter of evidence, & it is not necessary to state the demand specially – for the form is the same of declaring in the several cases of trover, & it is necessary to alledge only a general demand –

The action of trover is concurrent with some other actions

as in the first Case, ~~towit.~~ for a tortious taking the action may be either ~~fin~~ trover or trespass vi et armis in most cases ~~—hindered~~ But there are many cases of injury to personal propy. in which trespass will lie where trover will not, & unless there be an unmotion of the propy trover will never lie.

Where the tortious taking was also felonious, the action may be either trover, trespass or theft — for by stat. an action of theft is given for the redress of a civil injury) & if to such an injury there be superadded the circumstance, that the thing thus taken was sold — then the Pltff might elect to bring trover, trespass theft, or Ind. Ass. for money had & rec.—

In the 2d Case of trover, where the taking was rightful but the use wrongful — if the propy be sold, or otherwise disposed of, the action may be either trover or Ind. Ass. for the price rec.— 2dly where there has been no disposition of the property, but the purpose of the bailment has been exceeded, the action may be either trover or a special action on the Case —

But in the third Case where there is only a wrongful detention no action but trover will lie —

If it has been decided ~~that~~, where one has a genl. & another a special property in the article trovered, either may bring trover — If the bailee bring it, he by that means becomes liable over to the bailor tho' he were not before — ~~for~~ the action by the bailee is a bar to any after action by the bailor for the same

When the bailee brings the action the rule of damages is the value of the goods & the damage he has sustained by loosing the use of them — When the bailor brings the action, the rule of damages is the value of the goods only, as in common cases, but such recovery would be no bar to an action on the Case by the bailee for the damage by him sustained by loosing the use of the goods, but in such case he recovers for such injury only, & nothing for the value of the goods, for which the bailor had recovered in his action —

If the bailor take the goods out of the possession of the bailee before the term of the bailment expires no action of trover lies, but an action of trespass on the Case is the proper remedy —

When articles have been stolen & sold from hand to hand, the owner may maintain trover for them in whatever hands he finds them after making proper demand for them — unless they were so purchased in the course of business as to vest an indefeasible title in the buyer, & then none who come to the possession under that title are liable — Sales which give such title are those at auction by an Officer, unless the buyer be warned at the time of purchase that the Officer had no right to sell — such too is the case of whatever is sold in market overt — So too money & all that passes as such, as bank bills, is privileged from this action in the hands of a third person — The effect of a judgt. in this action is to vest the title in the Deft.

Of Trover

for damages being given to the value of the article in dispute, the defts. is considered as the pur-chaser — This however is not the case when the ar-ticle has been returned; for in that Case the dam-ages are not the value of the article, but only to the amount of the injury sustained by the detention & the injury done the article if any —

Trover has in some cases been maintained when strictly speaking there was no conversion to the Defts. use — as against an Excise Offr. for seizing goods wrongfully, for he in such Case holds the goods for the public & not for himself — it however is held a suffi-

3d Wils. 146 — cient conversion to maintain this action —

Where ever there has been a partial conversion atten-ded by a direct injury to the remainder, trover will lie for the whole; as if one take out spirits from

Stra. 576 — a Cask tortiously, & then fill it up with water — When a Servt. in the business of his Master trovers any thing either he, or his master may be sued, as in the Case of trespass — One tenant in common can not have trover against another, unless the property trovered be

Cowp. 455 lost & destroyed, in which case an action would lie —

The same is the Case if the injury be trespass committed

Cal. 200. by one ~~joint~~ tenant in common against another —

Trover will not lie against an Exr. unless the proper-ty came actually in specie into his hands, & then not

Cowp. as Exr. but as principal; but the remedy in such case

375. must be by asst. — Trover does not lie against a common Carrier when the articles committed to him

Sal. 655 are lost in such a manner as he could not prevent.

but the action is Case — but in all other cases trover lies for non delivery of the articles &c —

The Declaration in the several Cases of trover is the same — it must stated that the Pltff lost the goods that the Defts found them & converted them, & it must appear from the statement that the conversion was after the finding, either by mentioning a certain day subsequent to the finding, or by using the word after — & if the word after be used, tho' it be with &c. on such a day, which was before the day on which they were stated to have been found, yet it will be good, & the &c. be rejected as surplusage Cro. J. 228 — The goods must be described, but to what degree of nicety the description must go, it cannot be accurately laid down, for the authorities are contra-

…6.
…262

-dictory — It has been said that in trover for a bond it is not necessary to set out the date or sum — The time & place must be stated, at least such is the prac-tice, tho' there is no substantial reason for it — for the action is transitory & there is no Stat. of limitations respecting it. The idea of the necessity of stating the place in Eng. results from the notion that it must be tried by a jury of the vicenage; but this is mere fiction as to all transitory actions, for under a &c. the cause of action may be stated to have arisen in

…l. 290.
…o. 973
…142
…902

any place — It is also usual to state the value — Tho' it is said that the gen.l issue is the only defence to this action, in the books, yet spe-cial pleas have been allowed both in Eng. & in Con.t — In Eng. (but not in Con.t) articles of a certain value & not cumbersome, are allowed to be brought in to Court & the action stoped —

Of Replevin

There are two kinds of Replevin both in Eng. & Conn.t but of these one only is common to both Countries. The first kind of Replevin, is when the Landlord takes a distress for rent, this in modern times he is permitted to sell at the Post, & turn into Cash. As a remedy against such Landlord, & to prevent the sale of such articles as are distrained which may often be very detremental to him, the tenant may have his writ of Replevin, & that too whether the Rent be due or not. The method is to sue out a writ of replevin directed to the Sheriff, commands him to replevy the goods, the Pl.ff in replevin giving sufficient bonds with surety & that he shall prosecute the Replevin to effect, & if the Pl.ff fail to pay the money due, or the bond may be absolute to pay the money due. After this upon the prosecution of the Replevin, if it be found for the Landlord who is the Def.t, judg.t is rendered for him, to amount of the rent due & the Cost of the Replevin, against the Pl.ff in Replevin, & if he fails to pay it, the surety is liable. In Conn.t we have no such practice as that of taking property by distress for pay.t of Rent or other dues, & consequently no use for this species of Replevin.

The 2.d kind of Replevin is common to both Eng. & Conn.t, to wit, that for the relief of Creatures taken damage feasant & impounded; which they may be if taken on

the land where doing damage – The process in this case is much as in the other Case – In Conn^t. a writ issues of Common right from a Justice, upon the Plff's finding sufficient sureties, directed to the offr commanding him to replevy the creatures therein described, at sight of which the Pound keeper is oblig-ed to deliver the creatures impounded – The bond in Replevin is that the Plff shall prosecute his Replevin to effect, & make good all damages in default thereof – The Plff's own bond will not do, & if a Jus-tice take it, & the Plff fail, he will be liable to the adverse party – After the precept to replevy the Plff in this action goes on to declare against the Deft. in trespass for taking his creatures &c – & upon the trial if it be found that no damage was done by the creatures impounded, or that the im-pounder proceeded illegally in the business the Plff recovers his cost & damages – but if for the Deft. he recovers his damages, costs of impounding & to ascertain the damages our Stat. provides that the Deft. in Replevin may before trial have the damages appraised, which appraisal will be the rule of damages, but if the appraisal exceed fifteen Dol^s. the Justice can not render Judg^t but must dismiss the suit – in which case the Deft. must look for his remedy for the damages to the Replevin Bond –

When Cattle break through their owner's fence into the inclosure of another, they may be rightfully be impounded if taken in such inclosure- but if the Cattle break through the fence of the owner of the field, his right to impound them depends upon the sufficiency of the fence, where such breach was made- for if the ~~defence~~ fence be sufficient where the breach was made the Cattle may well be impounded altho' it be insufficient in other parts, but if the Cattle enter through a part which is not legally sufficient the impounding of the Cattle will be illegal & a trespass- If however the ~~cattle~~ cattle break in from the highway & they be not commonable creatures as horses, they may be impounded whether the fence were good or not, but not if they were commonable cattle- & it depends upon the particular bye-laws of each place what creatures shall be deemed commonable & what not—

Our replevin of goods taken by attacht. is not known in Eng. for their is no process in that County whereby goods are taken to abide a judgt.- This Replevin is not an adversary suit, but only a method taken to restore the use of the goods to the deft. in the attachmt. without impairing the security of the Pltff, suffici

-ent bonds being always required when the writ is granted to replevy; & the goods attached being thus restored, the parties go to trial on the first suit & not on the Replevin - & if the Pltff in the attacht- recovers he takes out his Exn. as in other Cases & if it be satisfied the Replevin bond is discharged but if property be not found, the Pltff need not take the body but on a return of nulla bona. the bonds-man becomes liable - But if such Creditor do proceed to imprison the debtor upon the Exn. & he swear out, still the Bondsman may be called upon, for an imprisonment of the debtor is not such a satisfaction of the Exn. as cancels the Replevin bond - the same is the case in this respect with all bail bonds - S. P. special bail is much

& it has been a question whether the bondsman in Replevin is liable to the whole extent of the demand in the orig. suit when the propy attacht- & replevied is of less value than the amt. of such demand. or only to the value of the property replevied the former opinion seems most agreeable to the words of the Statt.; but the latter is the more rational & better construction - This species of Replevin lies only for the Deft. in an attacht. against the Pltff in this replevin writ for if the Offr. by mistake attach the goods of a third person, such 3d. person cannot replevy them, but must have recourse to his action of trover or trespass -

Of Trespass Generally –

For all direct injuries to ones person, or his property real, or personal trespass vi et armis is the proper action – The distinction between this action & trespass on the Case is that in the one under consideration the injury should be immediate, & in the other it should be consequential, in order to support the action – It is a principle of law that a man after having peaceably, or legally entered upon the possession of another, by subsequent miscon-duct become a trespasser ab initio: this however must be from a misfeasance & not merely from a nonfeasance – as if one go peaceably to a tavern, but after entery beat the people of the house, this would make him a trespasser ab initio; but if he only neglect to pay for what he had it is a mere nonfeasance & does not
8 Co. 146 make him a trespasser ab initio –

One Case is said to be an exception to this rule (viz) if an Offr. do not return the writ to court by virtue of which he made an arrest he ~~would~~ is liable to the party arrested in an action of trespass vi et armis for the arrest – This however can hard-ly be called an exception, for the writ not being returned, the Offr. cannot prove that he ever had any authority to make the arrest; for no other

proof of such authority than the writ itself is admissible – the arrest therefore for ought that can appear to the Court, was made wholly without authority & the Offr. a trespasser in the outset –

When one involuntarily & by pure accident injures another no action lies, tho' there are a few dicta in the Books to the contrary – but if there be any negligence imputable to the person from whom the injury proceeds, an action lies, for of two innocent persons the one who is guilty of the neglect, if any, must bear the loss – The degree of care necessary to shield from liability is such as men of ordinary care would make use of – the extreme care of a very cautious man is not to be made the rule, neither is the loos conduct of a careless man to be indulged – & If the injury done was perfectly unintentional as to the person injured, yet if the person doing it was about an unlawful act which was the cause of such accidental injury, he would be liable, & Burrow 2092 its being unintended as it respected the injured party is 6 Esp. 161. no excuse – The action ~~fault~~ of trespass vi et armis will lie for bare threats if they be such as would intimidate a man of ordinary firmness, so as to prevent his pursuing his business; provided the person threatened actually suffered damage by being detered from his business –

Of Assault & Battery —

An assault the attempt or pretence of offering violence, as for one to lift his Cane or fist to strike, & for such an injury an action ~~lies~~ of trespass lies — as also for a battery, which necessarily includes an assault, & is any angery, wanton or insulting touching another; even a spiting in ones face is a ~~assault~~ battery — & will justify resistance — No language however threatening or insulting will amount even to an assault if unaccompanied with some action indicative of violence; nor will any language justify a battery in return, however gross it may be, but it will go a great way in mitigation of damages in a private action — But in an indictment it is said, ~~that the~~, insult &c. is not allowed to operate in mitigation of the offence — When two go out by agreement to fight, no damages ought to be given because the whole is in open violation of Law, & the parties are in pari delicto, & therefore the law ought not to interfere. But yet there are some cases which support a contrary opinion upon the ground ~~that~~ the agreement to fight being illegal is void, & of course no defence — Doubtless both parties in such case of fighting by agreement, are indictable as for a public offence —

Stra. Bul. N.P. 16

Assault & Battery

A battery may be justified- first, by an Officer when executing his warrant, provided it is necessary to the execution of it, but no further than that necessity extends secondly A parent is justifyable for inflicting due correction upon his child, the Master upon his servant a Schoolmaster upon his Scholar- The Books say that such chastisements must be moderate, but what should be deemed moderate is very doubtful- The most just rule to be observed, is that when the Parent &c acts according to his best judg^t he is not liable altho' he err in judging of what is proper, for he ought to be considered in a measure as acting in a judicial capacity- But when it appears that he acted out of malice & upon a wicked motive he is liable unless the chastisement was for a just cause & not unreasonably severe- A jailor, when his prisoner is obstinate & cannot be otherwise made to obey, may give him reasonable correction- So too it is excusable to whip a lunatic for the sake of quelling him- A reasonable force used upon any one to prevent his committing violence is justifyable- So too to prevent injury to ones self, as if another lift his cane or fist to strike you, it is not necessary to wait for the blow, but it is lawful to anticipate it, & beat the assailant in defence, but no farther- for after the assailant is incapable of a further

injury it is unlawful to continue the beating; for the true ground of justifying the battery is that it is in self defence - A man may also defend his property by violence & is not liable for any injury which the invader receives provided he could not have protected his property by less violent means - This is in case where the wrong doer is in the act of attempting to take the property but where he has actually got possession, whether the owner may re take his property by violence depends upon the nature of the Case - if taken feloniously he doubtless may at any time retake them by force from the felon himself - but when otherwise taken i.e. by trespass merely, the rule to be drawn from the authorities seems to be, that if one makes fresh pursuit & finds his goods he may use violence, if necessary to get them again, but otherwise it is if the wrong doer has been for some time in peaceable possession - One may make use of force to prevent anothers entering his house or upon his land; & even if the trespassor gets into the house & remains there for some time peaceably, yet if it be the dwelling house of the other & in his immediate occupation, the intruder may be turned out by force if necessary, at any time -

But such force cannot be used to expel one who came, or had been for some time peaceably in possession of ye lands, or the houses of another other than his immediate dwelling house—
A parent may justify an assault & battery in defence of his Child; & a child in defence of his parent— a husband in defence of his wife, & a wife in defence of her husband— a Servant in defence of his Master, tho' perhaps not a Master in defence of the Servt., but the point is not perfectly clear— But this right of interfering with violence is in Case when the relation is assaulted, & not where he is the assailant— & yet if a Son &c. come up & find one beating his father, he is not obliged to stay to enquire who was the assailant but may presume ~~that~~ the father was the innocent party & so may justify a battery in his defence
These several matters of defence must in Eng. be specially pleaded except in a public prosecution when they may be given in evidence under the Genl. issue— In Cont. they may in both Cases be given in Evidence— It is in Eng. no ground for enhancement of damages that the battery was attended with any circumstances of atrocious breach of law for of that the Public will take care; but in this State it has been admitted— Damages in this case ought to be proportioned to the situation feelings & relative circumstances of the Plff, as the same battery is a more grievous injury to one than another

Of False Imprisonment

False imprisonment which always comprehends a battery, is the depriving a man of the privilege of locomotion without legal authority - If a Pltff cause a deft. to be arrested & brought before a court of incompetent jurisdiction; if he does knowing of such incompetency of jurisdiction he is liable as for a malicious prosecution - but whether he do it with or without knowledge he is liable for false imprisonment - And if a Justice by a warrant made out & issued by himself, brings a man before him for any matter of which he has no jurisdiction, he is liable in this action - But if he only sign a writ already drawn without examining its contents or a blank which is afterwards filled with improper matter, he is not liable - As to the Officer serving an improper precept. the just rule to be drawn from the authorities (or at least that which has been adopted in Conn.) seems to be - that if it does not appear upon the face of the precept but what the Court had cognizance of the matter, the Officer is not liable for executing the precept, altho' it be so in fact that the Court ~~Superior~~ or Magistrate had exceeded their authority, for the Officer is to make no such indecorous supposition respecting the Court - But if the want of authority

Of False Imprisonment

or jurisdiction be apparent upon the precept the Offr. executes it at his peril, for he is bound to know the law tho' not the facts - as for instance if an Ex.n be issued by a justice of Peace for 50 dol.s an Offr. is to suppose that it issued on a judg.t by confession which would be lawful, tho' it might be upon a judg.t on trial, which would be illegal - but if the Ex.n be for 100 dol.s issued by a just. its illegallity would be apparent, & the Offr. liable for executing it - A different doctrine from this is however 10 Co. laid down in the Marshalsea Case & others which follow it - which is that an Offr. is not liable for executing an Ex.n erroniously issuing, or upon an erronious judg.t; but for executing one which was void, as if the Court issuing it had no jurisdiction, he is liable, whether it appear upon the warrant or not = & so many have been the decisions to this effect that it is difficult to say 2 L. Ray. 1229 that this is not the law of Eng. & yet the doctrine of the Marshalsea case is denied in a later authority where the Court say the Cases put in the marshalsea Case as precedents do not support it - Such is also the 2 Stra. 994 opinion of the Reporter in a Case in Strange - There are however still later cases which recognize 2 Wils. 382 the doctrines of the Marshalsea Case, & such is the weight of Eng. authorities - so that on the whole the point their seems not perfectly settled -

Of Trespass

There are ~~have~~ a great variety of injuries to property as well as to the person for which the action of trespass lies — As for injuries from cattle breaking into inclosures & doing damage trespass lies, or the remedy may be pursued by by distress & impounding — but while pursuing the latter remedy & determining the beasts in the Pound the injured party cannot bring trespass, neither can he if the creatures escape from the Pound by his permission or negligence — tho' if they escape ~~by no~~ through negligence of the Pound keeper he may retake them on fresh pursuit — But if the distress die in pound or escape the insufficiency of the Pound, the negligence of the keeper, or other means, without the consent of the impounder or ~~his~~ by his neglect, he may have either an action of trespass for the injury the same as if no impounding had taken place, or an action against (if the Pound keeper for the escape of the creatures if through his fault) or may retake the creatures as before mentioned — When one puts his cattle out to pasture with another, & they break into the inclosures of a third person, such third person may sue either the owner of the Cattle or the pastures — When the owner is sued, he may recover over against the keeper if the injury arose from the insufficiency of ~~the~~ his fence, for he in that case is the person in fault —

On the other hand, if the keeper be sued for the injury done & his fence was good, so that the injury must have proceeded from the unrulyness of the Cattle, he may have his remedy over against the owner of the Cattle, for the damage he has so suffered by means of such unruliness — these actions for the badness of the fence in the one case & for the un-ruliness of the Cattle in the other, or rather for the damage sustained thereby, are actions on the Case

If a man keeps wild beasts, or those which are feræ naturæ & they do damage either to the person or property of another, the owner is li-able for the first instance — but if an injury be done by any domestic animal, the owner is not liable unless the animal was known to be viciously inclined or accustomed so to do, & the animal's having once done such like mis-chief, ~~with the~~ & that be known to the owner, it shall be sufficient to subject the owner for all subsequent injuries of the kind — & in the declara-tion it is necessary to alledge the science in the owner — The proper action however, for injuries of this kind is trespass on the Case & under that head they ought regularly to have been arranged, & not under the head of trespass vi et armis —

Of Trespass

If an erroneous judg.t be obtained & the Ex.n issuing thereon be levied & satisfied, & afterwards the judg.t be reversed, still neither the Officer nor party to such judg.t can be subjected in this
1.st Wils. 155 – action for such levy; but in ass.t the party would be compellable to refund the money so collected.

When an Officer by virtue of any legal process against one person takes the goods of another by mistake he will be liable in trespass, notwithstanding it was done through mistake – To this rule however, the case of a Replevin is an exception, for there the writ points out & describes the goods to be taken particularly, & being thus identified the Off.r is not liable for taking them if they turn out to belong to another person –

Respecting search warrants – it is now settled law that ~~a~~ general search warrants, issued by a Secretary of State, or other Majestrates, are
2.d Wils. 288 – unlawful – but all search warrants must be special & precise in their directions – & if such warrant be issued for stolen goods, the person praying it out must swear ~~that the~~ goods ^ are stolen, that he suspects ~~that the person mentioned in the warrant has stolen them~~, with the grounds of his suspicion, & that such goods are in such a particular place – the warrant must be executed in the day time, by a

proper Officer, & in the parties presence— & after all these precautions, if the goods be not found: the owner of the house may have trespass against the party praying out the warrant—

In Con.t a very loose practice has been gone into of issuing gen.l search warrants, & that often to prevent giving offence— & to issue them without the requisite formalities— but the practice is illegal & very hazardous— If the articles found by means of the warrant be claimed by the person ~~by~~ with whom they are found, as well as by the person searching, the Officer ought not to deliver the contested articles to either, but should keep them untill the question of property is decided—

A lunatic is liable in an action for the injury he does by violence, but is not fineable ~~for~~ as for a public offence—

It is a principle of Law that a Judicial Officer is not liable to an action for his errors— but that a ministerial Officer is liable— such Officer is not in all cases liable— for if the process under which he acts be only erroneous he is not liable— but for an erroneous execution of his duty he is liable— again he is not according to Con.t principles liable for executing a void precept, if it does not on the face of the instrument appear to be void— but this can hardly said to be the Eng. law— however the authorities are contradictory & the point somewhat doubtful

But, tho the Officer ~~he~~ may not be liable for executing a warrant of the last description, yet ~~if~~ the Pltff or party suing out such void precept or warrant ~~be aiding in the execution~~ ~~he~~ will undoubtedly be liable, whether such illegality be apparent upon the warrant or not — But, as is before observed, if such ministerial Officer err in judgt. in the execution of his office, as if he take insufficient bail, for instance he is liable — But if an Officer take the bail of a person who at the time was sufficient but from some subsequent unforeseen accident he becomes a bankrupt, the Offr. is not holden to be responsible for such after failure — this at least is the rule established in Conn. altho' it does not appear to have been decided in England —

For erring in matters within their jurisdiction judicial Officers are not liable, but if they meddle with what is not within their jurisdiction or if their misconduct respecting matters within their jurisdiction be gross, & arise from malice, they are liable — So a pound keeper is not liable for receiving a wrongful distress — for tho' in this he assists others in doing wrong yet he does it unwittingly —

Cowp. 476 Stra. 851 —

One tenant in common cannot support this action against another tenant in common, unless the article which is the subject of complaint be entirely destroyed —

Of Trespass—

The law ~~relative~~ respecting the relative rights of the genl. & special property man— are in trespass the same as in trover—for which vide ante page 46—

[illegible] 367 In one book it is laid down ~~that~~ one cannot justify a battery in self defence if it be in a Church or Churchyard but this can hardly be said to be the law of Eng. & certainly is not the law of Connecticut—

2 Ro. 61. It is said that if a lessee for years cut down trees & suffer them to remain on the ground for a time, or as Coke in the report of the case says, untill they settle into personal property, & then they be taken away, the lessor may maintain trespass for them—(this by the by)

There is in Eng. a distinction between arresting a man who is not liable to arrest at all (as an Exr. or Admr.) & arresting one who is priveleged pro hac vice only—for in the former case it is false imprisonment, but in the latter it is not, tho' the Court will on motion discharge the prisoner, & if the privelege was by means of ~~the~~ a protection from the Court, the Offr. arresting is punishable for a contempt of Court—& yet such arrest is not so far a nullity but what if it be upon mean process, it will be consider-

1 Bla. Rep. 119 / [illegible] 646 ed as a sufficient summons & notice of the pendency of the suit— Arrests in civil suits made on Sunday are void & the Offr. liable for false imprisonment— In trespass, all who aid countenance or assist are principals— the injury is joint & several

that is, the injured party may take one or all & if he get judg.t against all he may pursue one or all with the Ex.n — & a release to one is a release to all — If there be several trespassers & some of them be sued, the Pltf may call such as are not sued as witnesses against their cojutors, & this is from the necessity of the case, which often furnishes no other evidence. This forms an exception to the gen.l rule respecting evidence; for such witness is ~~inte~~ interested to swear in such manner as to subject his fellow trespassers, for a judg.t against them clears him from a suit for the same injury — whereas if they be acquitted, he would be liable to a suit — for in matters of trespass, where several are liable a judg.t against one is a discharge to the others, whether such judg.t even be satisfied or not — & again when the whole damage is taken out of one of several joint trespassers, either by suing & getting judg.t one alone, or by suing them all, but collecting the whole ~~of~~ the Ex.n out of one, such sufferer can never compell the other trespassers to contribute their share — In this, as well as in the preceding circumstance mentioned, of the judg.t in trespass being a discharge of the cotrespassers without satisfaction, the law is variant from the case of contracts —

For in the Case of contracts when the money is all taken from one, he may compel his codebtor to contribute his part - & again when several are liable for the same debt it is not the judg^t. against the first sued, that constitutes a bar in favor of the others, but it is the actual satisfaction of the Ex^n. which furnishes the bar -

When there are several Defendants in trespass they may all plead jointly if they choose, & in that case they must all be found guilty or none & indeed if any one be ~~found~~ guilty they must all be found so - for if on will join another in a bad plea he must suffer the consequences of his indiscretion - But such defendants have a right to plead severally, & then ~~then~~ the jury can find some guilty & ~~so~~ others not guilty but when they find several guilty they cannot sever the damages but must assess it in gross against such as are found guilty, & that whether their plea was joint or several - But if the jury do sever the damages - the Defts cannot object - but the Pltff may - & yet if he acquiesce & consent to take Ex^n. for such portion of the damages as he chooses it will be well, but he can take only one ~~app~~ part of such apportioned damages & must relinquish the rest - & yet the Ex^n. for such portion as he takes, must not be confined to the one against whom they are assessed, must go against all, for each & all are liable for the whole damages -

Of Trespass—

The direct defences to this action are the genl. issue, not guilty, or a justification— In Eng. no justification can be given in evidence under the genl. issue— here in Cond., all may, except a release which is the act of the Pltff— In asslt & battery a principal justification is son assault demesne, but whether it is a justification or not will depend upon the manner— for if the battery inflicted by the Deft. was no more than what was proper for his defence against the assault of the Pltff, the defence is good, but if the battery by the Deft. be excessively unreasonable & unnecessary to prevent the violence of the Pltff, it will not be excused by shewing that the Pltff was the agressor— But to such defence ~~in that case~~ the Pltff may reply either by denying the fact of his being the assailant as by the replication of. de injuria sua propria absque tali causa, i.e. it was the deft's own injury without any such cause— or if the Pltff acknowledge that he made the assault in the defts Plea alledged, but relies upon the excess of the Defts retaliation— he will in his replication state the whole facts, so as to shew upon the record that the Defts. battery was greatly disproportionate to the injury by him rec'd & how far it was unnecessary— Tho' a day is always stated in the declaration of trespass yet it is no further in fact necessary than to shew that the Stat. of limitations has not attached upon the right of recovery, for tho' a certain day be ~~no~~ men-tioned yet proof of ~~an~~ the trespass any time within

three years is sufficient— this often makes it incon-venient for the Deft. he not knowing against what particular act of trespass he is to defend— but in such case, the Court if the Deft. mistake the trespass intended, will let him have time to prepare— Besides he may bring the Pltff to assign a certain time by pleading a special justification of the trespass upon a certain day. & if the Pltff will not take issue upon that point he must make a new assignment, that is, assign a day from which he cannot depart in proof— to which the Deft. may then make such answer as he deems proper— When the Deft. pleads a licence to enter, or the like, on such a certain day he must traverse all the rest of the time within three year, both before & after the day in such special plea mentioned, i.e. within three years next preceding the date of the Pltffs writ— So ~~too~~ if the Deft. plead a release, he must traverse all the time subsequent to the date of it up to the date of the writ— & again if the Deft. have purchased the land but the Pltff be still in possession— & he plead his title he must traverse the time before the date of the deed, & within three year of the time of suing out sd. writ— for the defence must always be as large as the declaration, i.e. cover as much time as that can.

N.B. Tho' it is said in the books, & supra. that the Deft. may compel the Pltff to make a novel assignment, it is not easy from the other rules of pleading above, to see how—

Of Trespass on the Case

The action of trespass on the case lies for the consequential damages — And not unfrequently for the consequences of an act in itself lawful, as the putting a Spout on ones own land, which conveys the water
1st Stra. 634 on to the lands or buildings of another — so too for the consequences of an act in itself unlawful, tho' the act itself be not immediately injurious to the party suffering by it — As if one lay a log in
Cro. J. 446. the path over which another stumbles & hurts himself — the act of placing the log in the path was unlawful but not an immediate injury to the Pltf. but when he suffered from the consequence his right of action accrued & not before — Again this action lies for an injury sustained by means of ones neglecting to do that, — which by law he ought to do. But for the neglect of a mere moral duty, not enjoined by law, or an act of generosity & good neighborhood, as to take good care of an article dropped accidentally in the
Cro. E. 219 road belonging to another, no action lies — But yet in the instance put, if one takes such lost article into his possession, it should seem that he is under a tacit obligation to keep it with ordinary care; but perhaps no case has as yet come up to this even — This action lies whether the injury done was intentional or not, for if it was through
2 Lev. 1172 negligence the liability is the same — As where a person carelessly took a cross horse (knowing him to be so) in

a throng of men & he wounded one - yet if the Plff or person injured by his own neglect or folly is the principle cause of the injury received, he cannot maintain this action, altho' the act of the Deft. contributed to that injury - as where a Carman waited for the purchaser of a load of timber, to shew him where to lay his load untill his horses were frozen & spoiled; for if the purchaser neglected to instruct him where to lay the timber, he might leave it where he judged best - When the injury is against the public at large, as in case of blocking up the highway, an individual cannot have an action unless he has sustained some particular damage, & such damage must be stated in the Declaration - When a Servt. or other person employed, commits a trespass, tho' the action against them is vi et armis, yet if the master or employer be sued, the action should be trespass on the Case - So too, injuries done by beasts which are ferae naturae, or those which are of the domestic species, but viciously inclined, & not duly restrained by the owner, after being apprised of their having once done damage of the kind, subject the proprietor or keeper to this action - If a Physician or Surgeon injure a patient through unskilfulness he is liable in this action - But if a man will employ a quack (in Eng. any one who is not a licensed practitioner) he must take the consequence of his folly, for no action lies against such person for unskilful practice - Selling bad & unwholesome victuals or drink subjects the vendor to this action -

Of Trespass on the Case

The actions ~~per quod~~ for beating ones wife per quod consortium amisit, & for beating ones Servt. per quod servitium amisit, are generally ranked among trespass vi et armis, but are with more propriety ranked among actions of this nature. When the action is for the battery itself to recover the smart money, for the beating of the wife, it must be trespass vi et armis & the wife must join in it, but ~~that~~ brought by the husb. for the consequential damage, towit, the loss of her company &c, regularly should be an action the case. The action for debauching a Daughter tho' usually by trespass vi et armis per quod servitium amisit, might more properly be an action of trespass on the Case — It is evident from the Cases upon this head ~~that~~ loss of service is not the principal ground of damages, but that the disgrace & injury done to the feelings of the parent are taken into consideration & are even the principal ground, but yet none but the person entitled to the service can maintain the action — The father may however maintain this action after the daughter is of age if She still resided with him & was of his family, but if seperated from him & emancipated the action will not lie

3. Wils 18. 3. Burr. 1878. 2. Term Rep. 16.

And if the daughter was a person of ill fame so that no seduction is presumable no recovery will be had

Of Trespass on the Case (Escapes)

The Sheriff was at all times liable for the torts of his Deputies, Bailiffs &c, relating to their Office, as if they suffered a voluntary escape of the prisoner, but for other torts committed while in the execution of their Office & not necessary to it as for unnecessarily beating a man whom they were about to arrest or for taking the property of one man upon a precept against another the Sheriff formerly was holden not liable; but by more modern decisions it has been settled that either the Sheriff or his Officer may be sued for such misconduct, tho' the Off. only is liable criminally when the misconduct has arisen to such a degree as to constitute a public offence But when the wrong done by the Deputy &c is in a matter more particularly & intimately belonging to his Office, as a negligent escape &c the Sheriff alone
Coop 403. is liable — In the early periods of the Eng. law it is said that the Sheriff was not liable to the party for an escape, but was punishable as for a crime But the Stat. of Westminster gave the action of debt for as an Escape against the Warden of the Fleet which by the equity of the Stat. was by the Courts extended to all other Prisons & their keepers — Soon after the action on the Case came into use — In Case of an Escape upon mean process Case is the only action, for the damages being uncertain before judgement, Debt will not lie —

Of Escapes—

There must be an arrest before there can be an escape— An arrest may be either actual or constructive— An actual arrest is by an actual touching with the hand, accompanied with a declaration of the intention to arrest by virtue of a precept mentioned— A constructive arrest is when the offr declares to the person to be taken, that he has a warrant or other precept to take him, & that he is his prisoner, or words equivalent, & the person thus addressed, & by his words or actions, or both ~~that he~~ manifests his submission.
Sel. 79. If after any such, or other lawful arrest the prisoner escapes the offr is liable— but may use force, & if requisite raise the power of the County to retake such prisoner— When to effect an arrest, the Sheriff commands, or delegates one to make the arrest, or assist him in doing it, without any warrant, the person so directed may lawfully arrest in the presence of the Sheriff; & it has been resolved that if the Sheriff be out in the party when the arrest was made, it shall be deemed an arrest in the Sheriffs presence, altho it ~~wit~~ be not within
Cow. 64. his possible view— If the Sheriff suffer a prisoner on mean process to escape, he will be

holden harmless if he have the prisoner in custody at the return of the Writ — provided the escape were before the prisoner had been lodged in gaol — but if such prisoner escape after being lodged in gaol the Sheriff will be liable altho' he retake him before the return of the writ; unless indeed, the recaption were before the writ was sued out in which case he is exonerated — And if such prisoner upon mean process be rescued on the way to prison the Sheriff may return the rescue & it will be a sufficient excuse — but when such prisoner is once lodged in gaol, the liability is in all respects similar to ~~that~~ in the case of the escape or rescue of an Exd.n prisoner — which in all cases, (whether the prisoner be committed or not) subjects the Sheriff, except it be effected by act of God, the open enemies of the land, or inevitable accident — A voluntary escape subjects the Sheriff without remedy over, for he can neither retake the prisoner (unless he consent) nor sue him for damages — Nor even if he had taken a bond of him for his security against all damage for letting of him go, could he collect such Bond, for it would be for an illegal consideration & void — the Sheriff for such an offence would be liable to punishment, which in Eng. is usually loss of his Office — The Creditor may if he choose pursue & retake the prisoner which exonerates the Sheriff

But if the Cred^r. himself release the prisoner the Sheriff is not liable, & the prisoner can in such case never be retaken—for the release of the body, unless new security be taken, is consider-ed as a release of the debt—

In case of a negligent escape the Sheriff is liable & that too for the whole ~~damages~~ debt unless he retake the prisoner upon fresh pursuit, i.e. before the Creditor brings his action; for it seems any retaking before action brought is deemed a taking on fresh pursuit—

But the Sheriff in this case is not without his remedy for he may retake his prisoner at any time tho' it be after action brought, or he may sue the prisoner for the escape—& if there was a bond to abide a true prisoner such bond would be legal & collectable—

& It has been a very litigated point, especially in Conn^t. whether an escape from the liberties of the Yard be a voluntary or a negligent escape—but has

2. Ter. Rep. 126 finally been settled to be a negligent escape—

If it were considered as a voluntary escape, it was urged, that the bonds to the Sheriff for the liberties of the Yard, must be deemed illegal & void: & on the other hand if it be considered a mere negligent escape the prisoner might transgress every day provided he returned within the limits before the Creditor could serve a writ upon the Sheriff: true the bond to the Sheriff would be forfeited but the damages would

be no more than nominal if no suit had been brought against the Sheriff – The most rational way of considering it seems to be, that if the Sheriff being apprised of his prisoner's having transgressed, does not immediately shut him up, it shall deemed a voluntary escape if he again transgress – In Eng. if a Prisoner escape through the insufficiency of the gaol, the Sheriff is liable – but in Con. by Stat. the County, & not the Sheriff, is made liable for such an escape – The County is however, liable only in the event of the Creditor's being unable to collect his debt out of the estate of the person escaping, or such as helped him out – but in such case if estate cannot be found the Cred. need not take the body, but have recourse to the County by a particular mode of process pointed out in the Stat –. The Sheriff may be liable for an escape in Con. altho' the gaol be in fact insufficient – as if he put the prisoner negligently into a broken room or the like, when there were other parts of the prison which were more secure – & in this case the Cred. would have a threefold remedy – against the Sheriff, the County, & the escapee –

The actual breaking of the gaol is ~~sufficien~~ sufficient proof of its insufficiency so as to subject the County, or in Eng. the Sheriff, however strong & firmly it be constructed – for

When the County is sued for the insufficiency of the Jail, the action being in the nature of an action on the Case (tho in form somewhat different) it has been a matter of great controversy whether the Court were bound to give the whole sum due from the Debtor or not - & the decisions both in the Sup. Court & the Court of Errors have been various & contradictory, but it seems to be generally considered at length as settled that the Court may give damages at discretion, & are not bound to give the whole sum due from the debtor - Such too has been the decision in Eng. in Case against the Sheriff - for

2. Ter. Rep. 126. the same principle will apply in suits of that kind - In the Case quoted in the margin the Court ground themselves upon the idea that trespass upon the Case was the common law remedy & that the remedy by Debt was given by Stat.: & it being incident to the action on the Case that the damages are uncertain they suppose that if a man declines to pursue his common law remedy he is not to be favored - But the truth of the case seems to be that there was no remedy at all in any civil action at common Law, & that the action upon the Case was given by Stat. as well as that of Debt & in fact one year later than that action -

Of Escapes

So that these remedies ought to be considered as concurrent & the recovery should in each the same: & had that not been the design it would have been idle to give the action on the Case: because in an action of Debt which was previously given the whole sum must be given; & no one would therefore pursue a partial remedy when a complete one was at hand— Besides in all cases where the demand can be liquidated & reduced to a certainty the Courts are or ought to be as much bound by it in Case as in Debt— If the prisoner who has escaped is able to pay the Eng. Courts do not give the whole damages in an action on the Case against the Sheriff, for they say the Cred.^r may have his remedy against such escaper— but if such person escaping be a bankrupt the body is all that the Creditor could have, they therefore in such case
[illegible] 2:60. subject the Sheriff to the amount of the whole debt
Our Court seem to have adopted the reasoning of the Eng. Courts in the first case, as applicable to suits against the County, but not in the last, for they say if the escaper be ~~be~~ a bankrupt it could be of no advantage to the Cred.^r to keep him in gaol— so that it should seem that the County in any event is to come off very easily— It has been decided in Conn.^t that if an Off.^r let a prisoner go at large after taking him in Ex.^n, it shall not be deemed an escape provided he retake & commit him

during the life of the Execution - & if he take a bond of such prisoner that he will resign himself up to be taken again within the life of the Exn. such bond will be valid - But such indulgence can only be tolerated before the prisoner is committed to prison. It seems that (except in the above mentioned cases where the reception must be in the life of the Exn.) if the Sheriff either in Eng. or Cont. voluntarily suffers the prisoner to escape he has lost not only the right of retaking him by force, but even if the prisoner return of his own accord he (the Sheriff) cannot detain him a moment longer than the prisoner consents to stay: unless, indeed, the Credr. consent to accept of him & discharge the Sheriff from his liability in which case the detention would be consider-ed to be the act of the Creditor, & therefore lawful - If there be a negligent escape & the Creditor before reca-tion discharge the Debtor - the Sheriff cannot retain him for his fees, but must have recourse to his action but while the prisoner remains in Custody he has a lien upon his body for his fees altho' the Debt be discharged - But after the Debt & fees paid the jailer may not detain the prisoner for what is due him for the prisoner's board - If a prisoner on mean process escape or is suffered to go at large before commitment it is no escape if the Sheriff have him at ye return of ye writ.

but no return will exonerate the Sheriff for not producing the body after once arresting it, except that of a rescue — When once an arrest has been made by virtue of an Exon the Sheriff is in Eng. holden liable for suffering the debtor to go at large for any period, or if he be rescued by a mob &c Cont. as is before mentioned, the Offr is not liable for any enlargement of the prisoner untill the ex-piration of the Exn. for he has untill that time to re-take & commit the prisoner ——

Trespass on the Case lies against an Atty for appearing in a case without being employed so too for negligently managing a Cause, so that the client's interest suffers thereby — This action lies ag-inst all public Officers & Majistrates for neglecting or refusing to do their duty, as for example, against a justice of peace for refusing to sign a writ — This action also lies against the naked bailee when guilty of very great negligence — & the liabili-ty of the bailee in such case depends often much up-on the humor of the Man — for if he be naturally very careless, he would not be subjected for the same degree of negligence that a careful man would, for it is always deemed sufficient for a bailee to pro-ve that he took the same care of the property entrusted to him that he ordinarily does of his own & perhaps a less degree of care in case of such naked bailee will do — The same is the case of the comm-

carrier or bailee at all events – other actions however as ass[t], may be resorted to in such cases – A Common Carrier is any one who conveys goods either by land or water, by public appointment or by his own undertaking: & he is liable in all events except the loss be by act of God, the open enemies of the land, or the fault of the employer; for no other accident however unforeseen

2 Ray 909 will excuse – If a loss hapen by act of God, as it is called, if the Carrier was any way in fault for incurring a manifest risque, he will yet be liable; as if a hoyman rashly venture out

Sha 128 of port in a storm, & loss ensues – But in case of an unforeseen storm the hoyman may to save himself throw the goods over board, & it will

1 Ter Rep 27. 1 St. bent. 109. 1 Ter. Rep. 33. be considered as the act of God – It is no excuse for the Carrier that he was robbed by a mob, or clan of Robbers, as was before observed – To subject the carrier to the rigour of the law the goods must have been delivered to him, & not merely put on board his hoy, or other vehicle – If there be fraud on the part of the owner, as to tell the Carrier that the property entrusted to him, was of less value than

Car. 285 Sha. 454 Bur. 2278 it in fact was – the Carrier would be liable for no more than he had pay for carrying –

A Ship which carries freight was originally considered in the same light, but now by act of Parliament – the owner, or master (for either may be sued) is liable only to the value of the Ship & freight –

Of Trespass on the Case

When the owners are sued they must be sued jointly or it will be matter of abatement, but not of arrest — The carrier after having lodged the Goods at the place appointed, is not yet discharged from liability, for he must if practicable inform the person who is to recieve them — This action against the Carrier lies both for the consignor & consignee — Hackney coach men & such others whose business it is to carry persons & not goods are not common carriers —

The Post master Genl. is not liable for the misconduct of his Deputies — A Common carrier has lien upon the Goods in his hands for his pay — This too, is the proper action against Innkeepers for which & also for more of bailment & escapes vide ante 1st. Book of Exchants

This is the proper action against a pawnee when the thing ~~lost~~ pawned is is lost or injured — the pawnee, it is to be observed, is not liable when he takes reasonable care of the thing pawned; unless it be after a tender & refusal of the money for which the pawn was made, for then he is liable at all events —

The pawnee may only use such things as are not the worse for use as jewels, or such things as are costly to keep as horses which may used enough to pay for their keeping — But there is this difference between the two Cases — that if the jewels be lost while so in use the pawnee must pay for them, but not so of the horse if lost in such use —

So Case is the proper action for the misuse of any thing bailed to any special bailee - If the thing bailed be totally ~~lost~~ destroyed by violence the action of trespass vi et armis may be resorted to as a concurrent remedy - If one gets any property into his possession by fraud for the purpose of running away with it - it is deemed to be theft; but if the design to run away with it was formed subsequently to the articles coming into ~~the~~ possession, it is not theft - The genl. rule respecting the liability of the special bailee, is that if he use a reasonable degree of Care, & not exceed the purposes & design of the bailment, he is not liable for any loss - but if he be unreasonably negligent, or in the least degree exceed the limits or purpose of the bailment he is at all events liable - & even the act of God does not excuse him - Yet if the cause of the loss can not in any way be connected with the circumstance of changing the design of the bailment, as if one hire a horse to ride North a certain distance, & instead of that he ride him the same distance south, & the horse there sicken & die of a natural disorder, perhaps a Court might recognize a distinction from the genl. rule, such as would exonerate such bailee - but no case of this kind is to be found & the genl. rule is against the supposition

Of Trespass on the Case

Case is the proper action where any kind of fraud or deceipt is practised in sales — It lies ~~for~~ in case of a warranty, false affirmation, suppression of the truth as to invisible defects, want of title &c — In the case of warranty fraud is not properly speaking the gist of the action; for a seller may warrant what was really unsound not knowing it to be so, & yet he would be liable upon the warranty — & in such case the allegation of the defts. knowledge of the unsoundness does not seem to be necessary — In the
1.51 case of the Beazor stone judgt. was arrested ~~because~~ because science was not alledged in the declaration —
289. But a Case in Sal. & others are to the contrary — these were properly speaking, cases for false affirmation — It seems from the books, that if a warranty be made in such manner that it is manifest there was no serious intention of bargaining, such warranty is of no validity, but when in serious contemplation of a bargain & at the
420: time of the contract it is binding — When the vendor warrants or affirms a thing to be sound, it is with the exception of all obvious defects, & he is liable only for such defects as are not obvious, but require some degree of skill to discover — a warranty is of no binding force if not made at the time of sale — for one made either before or after is of no validity — On the ground of fraud a recovery may often be had when no recovery can be had upon the ground of warranty, tho' the bargain be accompanied by a warranty — for any

false affirmation or other fraudulent practice at or before the purchase completed, done with a design to deceive & take in the purchaser, will be a sufficient ground of an action on the Case in nature of an action of deceipt, provided the purchaser was in fact by such means deceived & cheated—

In case where there is a suppression of the truth respecting invisible, or not easily discovered defects, the gist of the action is the knowledge of the Deft., so that the scienter in such cases is an indispensible allegation, as it is indeed in all actions founded on fraud—

When one sells what he has no title to, if he does it knowing his want of title, an action on the case for the fraud lies— but if the vendor was ignorant of his want of title this action for fraud will not lie, for no fraud is in fact committed, but an action of assumpsit lies to recover back the purchase money the consideration having failed— but nothing in such action is given by way of damages further than the money actually paid & interest

Cro. Eliz. 472 2 Lev. 593— Sal. 210—

But if one sells what he has no title to, & it is not at the time of sale in his possession, the books say no action lies, for the doctrine of caveat emptor is said to apply— No case of this kind has been before our Courts & it is doubtful whether this principle would be adopted— If one sells an article which

Sal. 218 Cro. Eliz. 196

he supposes to be his, but yet knows that another will contest the property with the buyer, if he sells it without giving this information, if the purchaser loses it in the contest he can have an action either on the Case for the fraud it being a suppressio veri, or an action of Ass. for the purchase money, & probaly the former mode of redress would be supported on account of its being a species of fraud, but undoubtedly the latter form would do for the recovery of the purchase money — And again if the seller does give the information yet if he abate nothing of the price & the buyer does not agree to risque the property, an action for the purchase money would lie if the title fails. but if the purchaser being apprized of the circumstances agree to run his own risque, it is a bargain of hazzard & no action lies against the seller — & whether the fact of its being a bargain of hazzard appear from positive proof or is inferable from the purchase's being made at a reduced price the consequence is the same no action in any such case lying — The rule that an Ass. will lie when the consideration entirely fails, extends only to cases where there was some kind of fraud or falsehood, or when the vendor sold what he was not entitled to under a mistake: for where one sells an article as a horse, for instance,

knowing him to be unsound when infact he was, & not warranting the horse, no action of any kind will lie, tho' the horse be lost, for there being neither falsehood, fraud nor warranty the purchaser must stand to the loss.

For a bare false affirmation when it induces a contract by which the person crediting such affirmation, is a looser, an action on the Case in the nature of an action of Deceit lies, & that whether the person making such false affirmation gained any thing by it or not; for it lies for falsely affirming another person to be a man of property. if a contract & loss be the consequence of such affirmation, altho' such the person making such false affirmation was no party to the contract & gained nothing by it. So that where there is a lie told for the purpose of deceiving & which in fact does deceive, the action lies, & yet such affirmations as are mere words of course as for a retailer to praise his wares, when not particularly & confidentially enquired of respecting their quality, is not actionable, altho' they may have sold the better for it. Neither will a mere opinion tho' it should prove to be ill founded subject to an action as if one who wished to sell his horse should say he was worth thirty pounds, when he was not. but if he should say that J. S. had offered th

Of Trespass on the Case

sum, & the purchaser should bargain in consequence of such information, & be cheated; when in fact no such offer had been made by J. S., an action would lie for such false representation—

When one gets money by fraud or false represen-tations, out of another's hands which belonged …or. …83. to a third person, this action will lie—

An Infant is not liable in this action for a Che-…id. at tho' liable to be indicted if of a nature to support …58 such process against others—& the same is the Case …lo. …17. with femes covert—

By the Law Merchant an action on the Case lies for one merchant against another for neglecting to get his, the Pltff's vessel insured if a loss ensue, in the following cases—first—Where the Deft. was indebted to the Pltff in an ~~equal or~~ equal or greater sum than the amount of the premium, & the Pltff had written to the Deft. to effect the insurance—Secondly. When there had previously been a correspondence between the parties, & they had been in the habit of getting each others vessels insured on request, the one who neglects on such customary request, to effect the insurance, tho' not indebted to the other, is liable—unless he give such reasonable notice as would enable such correspondent to procure other insurance after being apprized of the renunciation of such custom—A third Case is where there has been neither a previous

indebtedness, nor correspondence - but when one for the first time, as it may be, sends the other a cargo, consigning to him the bills of lading, but taking a request to them that such consignee would effect an ~~upon~~ insur-ance upon his vessel back again, if the consignee accept of the consignment & he accept it with such condition & will be liable if he neglect to perform it, if any loss be the consequence of such neglect - These cases rest wholly upon the custom of Merchants & not upon any principles of the common law -

Altho the action for crim. con. is commonly if not always brought in the form of trespass vi et armis it seems most naturally to come under the head of injuries redressed by this action - & tho' the declaration be not in form of an action on the Case, yet in substance it is, & the same incidents belong to that do to this action - as that it is not outlawed under six years, & that ~~the~~ full cost is given altho' the damages be less than forty shillings &c.

The grounds of damages in this action are the injured feelings of the husb., the alienation of the Wife's affections, & the danger of imposing upon the husb. a spurious offspring ~~&c~~ - Many things go to the enhancement of of the damages in

this Case, as the previous happyness of the married pair, the antecedent good character of the wife; the particular turpitude of the Deft's conduct in the affair, as if the Pltff was his friend or benefactor — the rank of the Pltff, also in life, & the ability of the Deft. to pay — & the reverse of these considerations when they exist go in dimminution of damages — & if the husb. knowingly & voluntarily suffers his wife to live in a state of prostitution it is a complete defence —

The Deft. may, for the purpose of mitigation go into proof of particular acts of lewdness in the wife, or that she had had a bastard before marriage for the quantum of damages depending upon the character of the wife, her character is put directly in issue, & comes within that rule of evidence, ~~that~~ when the Character is put in issue particular acts of vileness may be proved — But it is not in this case admissible to prove mere genl. reputation of want of chastity, for that might arise from her intimacy with the Deft —

When a prisoner is rescued out of the hands of an Offr. the Offr. may bring trespass vi et armis, but his most proper & beneficial remedy is by an action on the Case — If a prisoner upon mean process be rescued on his way to goal, the Offr. may exonerate himself by returning the rescue, but if he elect to pursue the rescuers he becomes liable

the Creditor – A rescue is also punishable criminaliter on indictment, & upon ~~such~~ trial of such indictment the return of the rescue is in Eng. conclusive evidence of the rescue; but in Conn. the Sheriffs return may in such case be traversed & of course is not conclusive & uncontrovertible. The Sheriffs return too is admissible, tho' not conclusive evidence in an action brought by the Sheriff against the rescuers – In an action for a rescue ~~&~~ it is necessary to state the orig.l cause of action & the proceedings thereon – the arrest by the Pff & the rescue by the deft. but it is not necessary to state the manner of the rescue – When the Sheriff sues in this action the damages recovered is always the amount of the demand against the prisoner; & the same is the case if the Cred. be the Pff. provided the person rescued was an Ex.n prisoner; or even a prisoner upon mean process if a bankrupt – The person rescued is ex necessitate rei, a witness in this case tho interested to charge the deft. for a ~~re~~ satisfaction out of the rescuer discharges the witness from further liability to the Creditor – The escaper is also for the same reason as in the last case an admissible witness in an action against the Sheriff for an escape, provided it were a voluntary escape it operates a release for the escaper to render the Sheriff liable – In case of negligent escape the escaper would not have the same interest – for the Sheriff might sue him for a

Of Trespass on the Case

In Conn.t there is a Stat. compelling Offrs to do their duty which besides the Com. Law remedy inflicts a fine for not returning writs; but in order to subject the Offr. to this penalty the action must be brought on the Stat. — this Stat. has been decided however, to be applicable to actions on mean process only — An Offr. is bound to serve a writ tho' his fees be not tendered —

An action on the Case lies for inticing away another man's Wife altho' no allegation of crim. con. be laid in the declaration; yet if there be good cause for such interferance, of which the Court will judge, no damages will be given — as (for example) if the husb. treat his wife cruelly her relations or friends may safely entice her away, & not only so but may protect her against her husb. or any other person who shall attempt to sieze her —

An action on the Case lies also, for enticing away a Servant — And the deft's having hired the Servt. knowing him to be a runaway is sufficient evidence to charge him in an action for enticing the Servt. — And even if the deft. did not at the time of hiring know that such Servt. belonged to another, yet if he do not dismiss him when duly informed of that fact, this action will lie as for enticing &c — A journeyman is considered as such a Servant as well as an apprentice or menial Servant — If the Master takes a bond with penalty to secure against the desertion of such Servant, which becomes forfeited by such desertion — he can have no action against the enticer & employer of the Servt. — for he has set his own price in the bond & taken his security thereby —

Of Trespass on the Case

1st Cent. 25 This action lies for refusing a vote at an election
Sal. 19. for a voter if he is refused his privilege — And if
returning Officer return the wrong Candidate &
Sal. 502 so decided by the Legislature, this action lies in f
of the rightful Candidate against such returning O
In an action against the Master for mischief don
Stra. 1083 the Servt., the Servt. is not an admissible witness
But in an action per quod servitium amisit by the M
Stra. 944 1054 the Servt. is a good witness —
It often is the case in actions of trespass vi & arm
that under the alia enormia things are proved w
might have been a good foundation for an action
A Declaration in Case for an escape - should sta
(if it was an Exn. prisoner) an orig.l suit before a Cou
competent jurisdiction, a judgt. rendered, by the
& for what sum, an Exn. issued upon such judg
& that it was delivered to an Offr. (naming him) p
- ly qualified to execute it - that such Offr. actu
arrested the Deft. in the Exn. & committed him to g
(if it be the Sheriff who is sued as Gaoler) & that the d
suffered the prisoner to escape — or if it wa
the Offr. who arrested the prisoner who is Deft.
orig.l suit &c to the time of the escape is to be sta
But it is unnecessary to state whether the e
be negligent or voluntary, for that will com
properly enough in the replication — tho'
Declaration may doubtless with safety & propri
specify what kind of an escape it was —

Of Assumpsit

Assumpsit is of two kinds, Express, & Implied for the former the remedy is by Special Asst.; for the latter by indebitatus Asst. A special Asst. lies for the recovery of money expressly promised to be paid, or to recover damages for the breach of an express engagement to do a collateral act as to go to Hartford, to deliver a quantity of Goods or the like In the first instance, to wit, to pay a sum of money Indebt. Asst. is a concurrent remedy with a special Asst., but in the latter instance, to wit, to do a collateral act as to go to Hartford, special Asst. is the only action The proper sphere of an Indebt. Asst. is where there is no express promise to pay, or do any thing, but where from the nature of the thing it is equitable that money should be paid, in which Case the law implies a promise, an undertaking to pay. So too when one undertakes to do a piece of business if it be in the line of his occupation, the law implies an undertaking to do it well; but the action of Indebt. Asst. in such case has almost wholly given way to the action on the Case for the damage accruing from the faulty performance, in which no promise is counted upon — In an action of Indebt. Assa. it is necessary to state the circumstances of the Case from which the promise is to be implied & the equitable liability of the Deft. is to be inferred, & & then add that in consideration of such liability ~ Deft. Ass. & promised &

Of Assumpsit—

In some of the writers upon the subject it is laid down that Ind. Assᵗ. will lie only where debt will— this is far from being the case; for to support debt, there must have been some sort of contract between the parties, as well as a possibility of reducing the sum due to a certainty, but Ind. Assᵗ. lies in many cases where no contract at all existed between the parties— & is only implied by Ind. Assᵗ— lies, firstly, when there was an express promise to pay a sum of money— in this case how-ever, the more proper remedy would be an action of Special Assᵗ. or Debt— Ind. Assᵗ. however is often brought in this case, for the sake of safety, for if it be not in the Pltff's power to prove the promise posi-tively, yet his equitable claim to recover may be proved which is gist of this action, the law in that fur-nishing a promise by implication—

2dly Ind. Assᵗ. lies where goods or any other articles are taken up, by the Deft. without any express agreement to pay, or about the price— Here there being no express promise to pay, special Assᵗ. will not Debt, however, would in this case lie, for there was a species of contract between the parties, & the articles having a market value, the sum due for them is reducable to a certainty— In this case the ac-tion when Assᵗ. is called Ind. Assᵗ. for a quantum val[ebant]

3dly This action lies for a quantum meruit, which is when the Pltff has done some service for the Deft.

without their being any price stipulated between the parties— In this Case Debt will also lie—

4thly This action will lie upon an insimul computasset— Debt too will also lie in this Case, as will also a special Assit. if there was an express promise to pay the balance, but not otherwise—

5thly This action lies for money loaned— as does also Debt; & if there were an express promise to repay, special Assit—

6thly This action lies for money laid out by the Pltff at the request of the Deft.— here again Debt lies & special Assit. also, if the request be accompanied with an express promise to remunerate the Pltff therefor—

7thly This action lies for money laid out & expended without any request from the Deft., provided the Deft. was under a moral obligation to do what the Pltff has thus done for him, as to furnish the Defts family with necessaries in his absence— perhaps Debt might lie even in this Case— & in a case of this kind if there be any service done of an extraordinary nature for which the usual price would be an inadequate compensation— by a special action on the Case stating all the circumstances, a recovery may be had for something more than the ordinary reward—

8thly This action lies for money had & recd. to the Pltffs use— & this may happen many ways; & in short whenever any one has the monies of another in his hands which in justice & equity he cannot retain, this action lies to recover it back, & that whether there be any actual

contract between the parties relative to it or not-
so that in many cases of this kind neither debt
2 Burr. 1010 nor special assᵗ lies - As where one pays money
by mistake this action lies - so where it is got away
by fraud or deception, where one ~~find~~ finds anot[her's]
money, or refuses when delivered over to him, to re-
-liver it - in the two last cases trover will also lie
Sal. 28 this action also lies when money is paid to the
wrong hand by mistake - in this case if the m[oney]
-may be lost by being paid to such wrong hands
the mistake was made by the payor, his debt is
not theirby extinguished; but if the Creditor was the
means of the money's being paid to this 3ᵈ person
by designating, or holding up, such person as his
reciever, the payᵗ to him will be deemed to be
well made & the debtor exonerated - Again
this action lies to recover back money paid on a
judgᵗ of Court, when any circumstance turns up
posterior to the judgᵗ which plainly shews that
the money in good conscience can not be
retained, & which had ~~they~~ it been known be-
-fore the judgᵗ was rendered, would have prevent-
-ed it by shewing ~~that there~~ was no cause of action
as (ex gra.) when there has been a recovery upon
a policy of insurance & the money paid, the vessel
supposed to have been lost, & for the loss of which
the judgᵗ was given, arrives in safety - but n[ot]
-ver for a mere enonious judgᵗ con such recovery...

Of Assumpsit

Again this action lies to recover back money when the consideration wholly fails – So too where a just debt by simple contract has been absorbed in a security of a higher nature which was void in law, as if obtained by duress, or in any other way defective & void, the simple contract revives upon the
1 Str. Rep. 732. avoiding of the security, & Ind. Ass. may be supported
It should seem in a case of the last kind, that this was not the only action which in such case would lie, but that, upon the avoiding of the security the same species of action which would have been proper before entering into such defective security, would become proper again upon the avoidance of it, but it is not a material point – Again – Where money is gotten from another by oppression, or taking undue advantage of the injured party's circumstances, as by extorting money from a Bankrupt or his friends to induce a Creditor to sign his Certificate of discharge, this action furnishes a remedy
Doug. 672 for the recovery of such extorted money – But when the parties to an illegal contract are in pari delicto in the view of the law, no recovery will be allowed the language of the Law in such case being melior est conditio possidentis – Upon the ground of subjecting those who take an undue advantage of another his situation it has been ruled that the borrower may in this action recover back what the lender

extorts from him beyond legal Interest — and yet it should seem that upon another ground it was questionable whether this would hold in all cases of taking more than legal interest; for many cases may occur when all the circumstances being considered such interest or premium was not unconscientiously ~~taken~~ taken; & it is a general characteristic of this action that it lies only where equity & good conscience forbid the Deft. to hold the money demanded —

When any one becomes a member of any Corporation, the law supposes that such person engages to observe all the by-laws of such Corporation, & if he breaks them to pay the penalty by such by-laws imposed, & for ~~such~~ the
2d Lev. 252 recovery of such penalty, Ind. Ass.t as well as Debt lies.

When money is paid to an Agent who has paid it over to his principal neither this action, nor indeed any other will lie against such agent to get back the money — but if not paid over to the principal, it may, by this action, be regained from the agent, if improperly paid — if the agent himself practised any fraud in getting the money into his hands, an action for such fraud would lie against him, whether he had paid over the money to his principal or not.

But this action will not lie in all cases to recover back money which a person has paid when not legally compellable to pay it — as if

one pay a debt which he might have avoided by pleading the Stat. of Limitations, there can be no recovery back of the money, for the payee can conscientiously keep the money; & when that is the case the genl. rule is that no action will lie — Money paid on a Wager at fair play can not be recovered back in Eng.; but if there was foul play a recovery may be had on the ground of fraud in a properly adapted action — In Conn. there is a Stat. remedy for the recovery of money lost at play whether fair or not.

The action of Assᵗ is not confined to ~~[illegible]~~ parole contracts, but lies also for the enforcing of such written contracts as are not of the nature of specialties — i.e. such as detail the contract at large, & do not, by expressing for value recd, remove the consideration out of sight, which in Conn., at least, constitutes a specialty without the aid of a seal — Of the former kind in this State, are recorded Receipts; the action upon which is usually Assᵗ, or if it be concerning any thing that will warrant it, Book debt, which ~~[illegible]~~ seems to be a species of Assᵗ, & then the Rect. is given in evidence merely — If the action be Assᵗ counting on the Rect., when it might have been Book debt a doubt has been by many entertained whether the six years Limitation would not apply to such action as well as to Book debt for which the action is a substitute — the better opinion founded on the seeming opinion of the Supr. Court however, is against this idea & if ~~that~~ be the true rule a Rect would not be outlawed any sooner than not

Of Assumpsit

Altho' Ass.t will lie upon a writing detail-ing the consideration, still perhaps an Indenture containing Covenants, & stating the whole contract is an exception to this rule; for in such Case it seems that Ass.t will not lie, but the action must be Covenant—

If A. says to B. I will take $100 for my horse & B. says he will give it—it is in the power of either to close the bargain. the one by tendering the horse, & the other by tendering the money—or if the buyer say I will give you your price but request a future day to be given for the pay-ment, & the seller assent to it, the bargain is as complete as if the pay had been made on the spot—for the property in the horse is vested & a right of action for the price attaches in the seller—But if the buyer do not accept of the terms offered at the time, he can not close the bargain upon the other at any sub-sequent time, by offering the price set. unless the bargain was postponed to another time & so remain open by agreement. in which case the buyer may close it at, or within the time. And in an action either ~~Ass.t~~ by the vendor or vendee it is necessary to state that the bargain was closed by some act on the part of the Pltff—If there was not a clear title to the thing sold in the vendor, or any fraudulent practice or

deception about the matter, the vendee may either affirm the contract & sue the vendor in an action on the Case for the fraud, or disaffirm the Contract & bring Asst. for the price paid for it provided the article had not been delivered, or there was a right reserved of returning it within a specified time - but in the latter Case the article must be returned before Asst. can be brought - & if there be a privilege of return-ing the article, but no particular time men-tioned, it must be done within a reasonable

Blac. 1078 time - When the contract in such cases is dis-affirmed & Asst. brought, the recovery is only the

Bur. 2609 money paid & Int., but nothing for the fraud - & if the article purchased be not delivered over, & the vendor refuse to deliver it, the buyer may either have trover affirming the Contract, or

Stra. 407 Asst. disaffirming it. Where by the contract or by the Course of trade it belongs to the vendor to deliver the articles, if they be lost on the way the seller must stand to the loss, altho' the propy. is vested in the purchaser immediately upon closing the bargain - but if it be the vendee's business to receive the articles at the hands of the vendor the loss in such case falls upon him - or if the

Cowp 295 - vendee give directions in what manner the goods shall be sent by the vendor, & they be lost in that way the vendor is excu-sed

Of Assumpsit—

In this country it is the custom for the Country merchants to receive the goods at the hands of the ~~Por..~~ importers, & of course they take upon themselves the hazzard of transporting them & in Eng. the usage is different— It is also frequently practised here for the importers to send to their customers such goods as they suppose they want without any particular order— If goods thus sent be lost on the way it is a question undecided whether the consignee can be made to bear the Loss— It seems consistent with the principles of the law Merchant that they should, when the custom is so thoroughly established as to supercede the principles of the common law; but of the sufficient establishment of such Custom in Conn. a doubt may be well entertained— It is common, especially in great contracts for the buyer when he does not pay down the whole price, to make a deposite of some money to bind the bargain as it is called & in such case if the vendor refuse to deliver the articles the buyer may either bring trover for the property, or Ass. for the recovery of the deposite & if a vendee in such case refuse to complete the bargain, the vendor may either affirm the contract & bring Ass. for the stipulated price, or may let

1. P. Wil. 745 the matter rest & keep the deposite, which in such case the vendee has forfeited, & cannot recover either in Law or

Of Assumpsit

At a vendue when the article is knocked down to to the bidder the bargain is closed; but if the purchaser does not pay down the price (unless the terms of the vendue, or of that particular purchase ~~was~~ gave a credit) the vendue master may resell the article - The vendue master is obliged to knock down the article to the highest bidder, & can not adjourn the vendue untill he has, without being liable in an action, be the sum bid ever so small - The vendue master cannot employ any one to bid for him, nor can the owner of the goods, to prevent their being sold at an under price, but the goods must be knocked down to the highest fair bidder, & if the vendue master will not, but knock them down ~~to~~ the article to a bidder employed by the owner who bids more than the fair bidder, the property still belongs
Cowp. 395. to ~~the~~ such fair bidder —

Wagers in Eng. are recoverable at Law (& usually by action of Ass.t) except when they are forbidden by Stat, or the remedy taken away: but yet the Courts suffer recoveries rather on account of the numerous precedents, than because such a practice is consistent with principle, for wagers are evidently against the policy of Law - There has been no decision upon this point in Conn.t, but it is apprehended that our Courts would adhere in such case to principle —

Of Assumpsit–

5 D. & E. 2803 Comp. 57. The requisites to a binding Wager in Eng. are that the event must be contingent, & unknown to the parties – it must be respecting such matters as will not give occasion to the in-troduction of indecent evidence, or such as would injure the feelings or reputation of Cowp. 729 third persons – No wager will be good which is made use of to cover an illegal transaction or in its immediate effects operates contrary Ter. Rep. 56 to public policy – Wagers are never consid-ered in the light of a Debt, & neither Debt nor Ind. Ass. will lie for their recovery, but a Special Ass. only–

When a person enters into an agreement to complete a piece of work by a day certain, & does not get it done by the time stipulated he can recover nothing for his labor upon such agreement whether in writing or by parole, for the failure is on his part, but neither can he recover upon a quantum meruit the usual price of labor per diem, for this would be encouraging people to fall from their agreements: but he may in the last mentioned action recover a propor-tionable part of what he was to have for completing the work; as, (ex gra.) if a joiner contract to build a house for £100 by a day set

& he gets it but half done by the time set, he may recover 50£, tho' perhaps if allowed by the day the usual price of labor it would amount to more than he was to recieve for finishing the house — And if he leave the work in such manner that the employer suffer damage by his failure to more than the amt. docked from such undertaker's wages, such undertaker will be liable to the employer in an action for such damages, either upon the Case, or upon the Covenants as the Case may be — Asst. will not lie to recover for a service voluntarily rendered by way of courtesy, tho' of advantage to the person to whom rendered, & done under an expectation of a reward; but if the person to whom such service is rendered afterwards promise to pay for it, such promise though subsequent will bind him — Cases of this kind are to be distinguished from those where the person making the voluntary advance to another was that others agent who generally transacted his business, for if he should advance something out of his own ~~fo~~ pocket unsolicited, for the benefit of his principal he might recover for it — & also from the Case where one furnished necessaries for anothers wife in his absence, for in such case the acceptance or request of the Wife is the acceptance or request of ye husband

Of Assumpsit

It has been determined that whenever one man does any thing by the way of advancing the Interest of another, whether by the ~~way of~~ advancing of Cash, or rendering any service either with or without the expectation of a reward, if there was no kind of contract about it, or solicitation, or promise to pay, it is a voluntary Courtesy & nothing
Stra. 728 can be recovered therefor; an example of such courtesy is where a Son serves his father after he is of age under an expectation of a part of his estate — When Assᵗ. is brought to recover a precise sum of money, actually promised to be paid, that ~~~~ sum is the rule of damages; but if there was no express promise to pay a certain sum the Jury are at liberty to consider what is equitably due — To the former position respecting the rule of damages in the case of an express promise there is this one exception, that when the promisor is entrapped, by not understanding the extent of his promise, as in the Baley-corn Case, for in that Case he was holden only to pay the worth of the service done — In Assᵗ. it being always necessary to state the consideration of the contract, whether special or implied, in the Declaration, in order ~~that~~ the consideration, giving the Equitable claim might be proved, if the Contract thus stated appears

to be illegal & of course void, a demurrer to the decla-
-ration will be a proper & effectual defence —

Ass^t. will not lie to recover money won at play,
nor indeed any other action, gaming being by Stat. pro-
-hibited — & if the money won be paid over the
Stat. gives an action to recover it back — but at
com. Law if the money won be once paid over
no action lies to recover it back, for it is the
maxim of the Com. law, that in pari delicto po-
-tior est conditio defendentis — so if A. promise
B. £10 to beat C. & he do it, he can not recover
it, & if A. have paid it over he can not recover
it back — Yet if one of the parties to an illegal
contract come into Court upon the ground of
rescinding the contract, he may recover back
his money — as if A. give B. 10£ to beat C. & he
does not do it, A. may recover back the money
in this action — this seems not to be good, policy
for to allow of such a recovery is to encourage
1 Ray. 69 the commission of the illegal act for the sake
of retaining the money —

Where there are two or more engaged as partners in
an illegal contract, & one of such partners pay mo-
-ney due upon such illegal contract, to the person
to whom it is due, tho' this money could not have
been collected at law, yet if the one paying it
did it at the request or with the approbation of his

3.D.Te. Rep.418. partner, he can, in this action recover his share of such partner — Where two persons make a contract out of the Realm, & one of them being an Englishman sells to the other commodities which he knows the purchaser is about to smuggle into Eng., still such seller may recover the price in an Eng. Court, for the contract when
Cowp 341 made was good — When one by deception & falsehood gets another unknowingly to do an illegal act to a third person, as to imprison him or the like, & the person thus imposed upon has damages recovered against him for such unlawful act, he may have an action on the Case, to recover against the person who
Hut. 55— deceived him — If one promises another a reward for doing what the law obliges him to do, as to an Officer to do the duty the law imposes upon him, such promise is void &
Bur. 924 no action will lie to inforce it — the reason given in the books is that it was an illegal transaction, but a more rational one is seems to be ~~that~~ there was no consideration for the promise — There is a Case in Cowper
793 which seems to go upon the ground, that the action of Ass.t being an equitable action cannot be supported to enforce an unconscionable demand, tho the contract was express —

Where there is no consideration at all, or a frivolous one, no recovery in Ass.t can be had, nor in any other action where the nature of the consideration can be looked into — What is meant by a frivolous consideration, is not that it is inadequate, but one which may be removed at the instant the promisee wills it to cease — as if A. should promise B. to pay him 100£ in consideration of B.'s making him an estate at will; for here B. might put an end to the estate in an instant, so that in fact the consideration is nothing at all —

Anciently it was the law that if the consideration was passed, no engagement to pay was binding; i.e. unless there was some previous request, it was no legal consideration — But the law now is, that if the act done was beneficial in any way to the promisor, it is a sufficient consideration for a future promise; but if not at all beneficial, a mere ~~future~~ subsequent promise unconnected with a previous request of some kind would not be binding —— If one being indebted to another promise ~~to pay~~ that in consideration he will not sue him before a day certain, that he will give him such a sum, Ass.t on such promise will lie — If A. owe B. 10£ on Note for any service & afterwards promise to pay him 5£ more for the same service, if such advance be equitable, perhaps Ass.t would lie for the 5£ notwithstanding the Note was for the same service, But no case of the kind is to be found

Hut. 84. Co. E. 282.

Of Assumpsit

& It is a general rule that this action will not lie where there is a security giving an action of a higher nature - & in one sense the rule is unexceptionable, for when there is a Bond for money, the contents of that Bond can be recovered in no action but one on that bond itself, & no promise by parol after made to pay such Bond lays any foundation for an action without some new & additional consideration - but if such promise be attended by any, even the slightest consideration, as if the Debtor say shew me the bond & I will pay it, assᵗ. will lie, upon shewing the bond; & in that case it should seem that the recovery will be the amount of the Bond - this seems to be liable to objection on the score of convenience, without any advantage to the subject, for the note in such case would be outstanding & to be defended against when sued by pleading the recovery on the promise in bar - In case however where the bond was outlawed, the allowance of such recovery upon the promise would be beneficial, & not liable to the foregoing objection the bond being dead, by means of the outlawry.

Cro. J. 598.
Moore 340.
Cro. C. 343.
Cro. E. 67
240 -

If A. pays money to B. to be by him paid over to C. & he neglect to do it either A. or C. may recover

in this action such money from B. – So again
if A. in consideration of services rendered on the like,
promise B. that he will pay his (B's) child C. a
certain sum of money, C. may recover in
ass.t of A. the sum promised, as in the Case of
Dutton & Pool in Ventris's, because of the relation
-ship, says the Books – But should not an action
lie, it may be asked, upon a promise made
to a third person for the benefit of the Pltff,
in all cases, when the money after being
recovered out of the promisor by the imme
-diate promisee, will be in his hands only
in trust for such third person? the cases
however, have gone no further than to allow
of a recovery in case of the person to be benefited
by the promise, being a near relation of the pro
-misee – In an action upon a promise
to marry, the consideration is always the mutu
-al promise; & when a Lady is the Pltff in such
action, if she proves a promise on the part of
the Deft, she is not holden to prove an expli
-cit promise on her part ~~of the~~ as the conside
-ration of the Deft's promise, for if there be
no proof of her dissenting to the proposal, her
promise will be implied – this is an indul
-gence to the delicacy of the sex who are not
in such cases expected to make open
and explicit promises, ~~which are~~ such as are provable

Of Assumpsit –

2 Bur. 1010 In the case of Moses & McFarlain an action of Ind. Assit. was sustained when the Pltff might have had his action ~~of the~~ Covenant – By the case this rule seems to be established seemingly, which may be in some measure considered as an exception to the preceding rule relative to assits. not being maintainable when there existed a remedy of a higher nature – It is this – that whenever the Pltff would disaffirm the contract & go as for his money wrongfully in the hands of the defts., the action of Ind. Assit. will lie; but when the contract is in writing & the suitor would proceed by way of affirmance of the contract, this action will never lie – ex. gra. A. & B. are about to make a contract & A. covenants by writing that he will not deceive or cheat B. in the bargain – but does cheat him in such a manner ~~that~~ the consideration for which B. ~~had~~ paid his money ~~had~~ totally fails – B. may in such case pursue his action on the covenant, or may by way of disaffirming the contract, bring Ind. Assit. for the money advanced – but in no case can an action of a lower nature be supported for the ~~recov~~ ~~ery~~ affirmance of a contract, where an action of a higher nature can be had –

In a case of this kind where certificates or other

Of Assumpsit

public securities were lent & a written agree-
-ment ~~a written agreement~~ to return them
by a day certain, which not being done,
& the Certificates afterwards appreciated & there
was a parol promise to pay their true value
an action of Assᵗ. upon such promise would
undoubtedly lie ~~upon such~~ notwithstanding
the written agreement, for from the apprecia-
-tion of the Securities, there was an existing
consideration for the promise —
If there be an engagement to do a certain duty
or pay a certain sum ~~by instalments~~ at a subse-
-quent period by several instalments, as to pay
100£ by monthly instalments of 10£ each, & there
is a default of payment of one of the sums at
the period appointed, a right of action immediately
accrues; & the recovery in such case is not the
10£ merely but the whole sum of the debt then
due — & the reason assigned in the Books is, that
being but one contract there can be but one
action — but the reason seems not to be well
Cro. El. 175. founded, for in the case put there may be fairly
said to be ten different undertakings to pay 10£ each
It is not certain that a Conᵗ. Court would follow
the Eng. rule in this case — And according to our Stat.
if the debt so to be paid by instalments be secured
by Bond, the failure of payᵗ. in one instance being

a forfeiture of the bond an action accrues for the recovery of the whole sum, but when judgt. is rendered, in order to conform the recovery to the intent of the parties, the Stat. directs the Court to issue Exn. only for the instalment then due, & for failure ~~of~~ to pay any ~~other~~ other instalment a scire facias may be brought & further Execution granted-

In all cases where there is a special promise to pay money. the inforcing of such promise, as has been before observed, is the proper province of a special Assp., yet it is said that Ind. Assp. will in such case lie; for tho' Ind. Assp. will not lie upon a special agreement untill the terms of it be performed; yet when that is done it raises a duty, for which it will lie- as if A. enters into an agreement with B. to build him a house by such a time, for which he agrees to pay him 100£. if B. fails of performance A. can resort only to his action of special assp., ~~but~~ if B. ~~fail~~ completes his work according to contract, tho' special Assp. seems his most proper action to recover his 100£. still it is said the Ind. Assp. will in such case lie - But it never lies to inforce the performance a special agreement to perform a collateral act.

Bul. N.P. 139

If A. agrees either in writing or by parol (for it differs not the case) to build a house for B. ~~a day~~

by such a day. in consideration whereof B. gives A. 100£, the time comes but the house is not built nor any thing done to it: now B. may either affirm the contract & sue upon the special agreement for his damages, or disaffirm the contract & sue in an action of Indeb. Ass't for money had & rec'd.— In this case it would have been the same if B. had given his obligation instead of paying the money, & the same action would lie, for to this purpose obligations are considered the same as actual payments— But if in the last case no pay't had actually been made nor obligation given, at the time when the right of action against A. accrued, then no action of Ind. Ass't would lie, but B's only remedy would be on the special contract— It is no bar to ass't in these cases ~~that the~~ contract is in writing & even under seal, provided the writing details the contract— & when an action is brought upon the simple contract tho' it be in disaffirmance of the contract as in the case above, such written contract may be given in evidence to support the action, unless such written contract or security be declared by law to be null & void to all intents, as is a Note given for money lent at

the time & place of play, for such security can not be admitted as any evidence of the indebtedness. but the Pltff must make out his case by some other proof, if entitled to recover at all, as in some cases he is, as where the Stat. makes void the security without mentioning the contract—

A case may be so circumstanced that the special agreement cannot be waived, because the security entered into was illegal. & Asst. brought upon the original implied contract; as if A. being indebt to B. 100£ for goods sold & afterwards A. & B. enter into an agreement that B. shall accept in satisfaction of that debt an annuity of 10£ for the life of A. & this ~~annuity~~ is secured by a Bond void for want of the Stat. requisites upon the avoiding of this Bond the special contract is renewed i.e. a right of action for the 10£ as that sum became annually due— but the orig.l contract or indebtedness as it ~~stood~~ before the agreement relative to the annuity never revives so as to support an Ind. Asst— for the whole 100£, for this would break in upon the agreement of the parties, & might give as the case might be, more to B. than he ought to have for if A. should die in two years B. by the contract would be entitled to 20£ only— This is Powels doctrine in controverting the case of Shaw & Wild—

Of Assumpsit

It is laid down as a rule in the Books that to maintain Asst. there must be some kind of assent in the Deft. either express or implied, but this is evidently an erroneous rule, for in cases arising out of fraud & extortion when this action is allowed of, & indeed many other cases, no assent is presumable. So too may be mentioned as a strong case, where a man turns his Wife out of doors, he cannot be supposed to assent to her contracts for necessaries, & yet for such contracts he is liable in this action - the cases which are quoted as supporting the principle that an assent is necessary, fall short
1st Fer. of supporting it. In the case of the Parish of Vedast
Rep. 20. & St. Michaels concerning their Sexton it does not appear that any Sexton was legally chosen, for he was chosen only by & for the parish of Vedast, whereas to have made the parish of St. Michaels liable for its share, he should have been chosen for both Parishes - & the case in Bul. Nisi Pri.
130 was a special Asst. upon the fraudulent bargain of the Servt. with the Defts., but the action ought to have been Ind. Asst. for money had & rec. or trover for the articles sold by the Servt. in such fraudulent manner —

There are three kinds of express promises - as
1st. a promise to pay so much in consideration

Of Assumpsit

of the promisee's doing a particular thing or to do a certain thing in consideration that the promisee will pay him a certain sum; in this Case the one who brings the action must state & prove performance on his part or a tender of performance at least —

2dly Mutual promises, as if A. promise to pay B. 10£ & B. promise, to deliver A. his horse here is promise for promise, & each one may have his action without performance or any allegation of performance on his part.

3dly Concurrent promises which are such as do not stipulate which part is to be done first, neither is one the consideration of the other, as if one promises to deliver his horse to another on such a future day, & the other promises to pay him 10£ on the same day — in this case it is necessary for the one who brings his action to alledge & prove performance on his part at the time appointed, for performance at a subsequent day will not suport the action; but if it is apparent that one part of the agreement is to be performed before the day of performance of the other, it must appear to have been so done in order to support the action —

It is a rule in Ass.t that the action lies only

for the person to whom the express or impli-ed promise (as the case may be) was made, either in person or by agent, or his Servt. acting for him. There is however an exception to this rule in favor of persons nearly allied by blood to the person to whom the promise was made,
1st. Vent 6-318 — when such person is dead, as in Dutton & Pool —

A promise to do a thing impossible in the nature of things to be done is void; but if the impossibility consists in the particular circumstances of the promisor, & is in itself not physically impossible, it is binding —

In order to maintain an Assst. in many cases notice & request is necessary; ~~& first~~ & in many it is not — Where the consideration is a precedent Debt or duty, & not created by the note or promise which secures or strengthens the right of recovery, as in ~~a~~ case of a Note for value recd., notice is not ne-cessary, till the suit is brought, unless it be so circumstanced that from the face of the contract it is evident that notice or request is ~~evident~~ necessa-ry previous to a performance on the part of the Debtor; as if A. should promise B. to bring a hogs-head of Brandy from N. Haven for him when he (B.) should request him, in satisfaction of a debt due B. — here no action would lie until request made.

In these cases it makes no difference whether it is money to be paid, or any thing else to be done —

Of Assumpsit

When there is no precedent debt or duty, but it is merely collateral, growing out of the undertaking or contract entirely, as a promise to J. S. to pay him 10£ when he (J. S.) shall go to Hartford for the promisor; J. S. must give notice of having performed the service before he can bring his action for the reward, unless it was so circumstanced that the fact of his going to Hartford was known to the employer, or might have been Cro. J. 432. known by him, he using due deligence, in which case notice is not necessary

The case was, in an action, the Deft. agreed to Hob. 57 68 – Stra. 88 – give as much for a quarter of barley as the Pltff should sell the rest for – the Pltff sold the rest for 4£ the quarter, & then brought his action without giving the Deft. notice of what price he had sold the rest for, & failed in the action – but had the agreement been on the part of the Deft. to give as much as J. S. should give for the remainder the action would well have lain without alledging notice for then the Deft. by using due dilligence might have known what J. S. gave – The difficulty in these cases is in determining when the Deft. has sufficient means of notice, & when not – When the debt or duty is created by the

notice, notice is not equivalent to a request - as when A. agrees to build a house for B. when B. shall request, mere notice to A. from B. that he has not built the house, would be idle & impertinent, & not sufficient to sustain an action upon, but there must be a request - But when that is done which creates a right of action in the person who performed it, as to go to N. Haven for the Deft. upon a previous agreement, but at an uncertain time, notice only is necessary & is the same thing as a request - The allegation of licet sepius requisitus, so necessary in an Eng. declaration, has been decided by our Supr. Court in one case not to be necessary - Whenever it is necessary in this action to allege performance by the Plff (which is the case whenever actual performance is necessary to the maintenance of the action) the manner of that performance must be set out, that the Court may decide whether it be a legal performance or not - as if the Plff state the consideration on his part to be that he promised to become bound to serve the Deft. one year, & that he tendered compliance in consequence of which &c - he must to make his statement good shew how he became bound, as by writing Obligatory, that it might appear that he was to be under

Hob. 69, 77 - a legal Obligation to the Deft. for otherwise there would be no consideration for the Deft.'s promise of a reward - & the same rule is to be observed in all the other parts of the pleadings -

Of Assumpsit

When there are several distinct consideration for the promise, it is necessary in Asst. to set forth in the Declaration & prove performance of all those several acts which constitute the consideration of the promise, or the action will not lie. But when the Pltf has performed but part of his engagements, his action must be Ind. Asst. for a quantum meruit; & his recovery will be in the same proportion to the whole reward promised, as the part performed is to the whole engagement— In all actions of Asst. it is not only necessary to state the indebtedness, but the manner how such indebtedness grew must also be stated, as for a horse sold, labor done &c— & this is required for the benefit of the Deft. that he may know how to shape his defence— & secondly that
1. Sid. 182 Carth. 276. the contract declared on may appear not to be illegal, nor entered into by specialty—

In an action of Ind. Asst. for money had & recd. in Eng. the declaration is however very genl. & states only that it was money had & recd. by the Deft. to the Pltf's use— which is very vague from the great variety of ways whereby the money of the Pltf may come to the hands of the Deft.— To remedy this defect it is the practice in Eng. to oblige the Pltf to give the Deft. a bill of particulars as it is called, specifying what parti

Of Assumpsit

*N.B. — Bills of particulars are never demanded ^it^ in Conn^t —

-ular receipts &c, of money he intends to prove at the trial — & to this he is holden in giving evidence — There is no such practice in Con^d.* & after much litigation it has been settled in this State that upon a gen^l. Ind. Ass^t. for money had & rec^d. evidence only can be admitted of the actual reception of the money by the Def^t. at the hands of the Pl^ff & proof of any other manner of acquiring it will be disallowed; so that in our declarations for money had & rec^d. it is necessary to state particularly in what manner the Def^t. obtained it, as it will appear in proof — for proof of no other manner than that alledged will be allowed.

In Ass^t. for money lent it seems that, lent is a technical term & an action for money lent by that name will lie only for the lender against the actual borrower i.e. the

Sal. 23 / 2 Wils. 141 — reciever of the money; for ~~money~~ an action against A. for money lent to B. at his (A's) request, will not lie; but use any other word as delivered, or the like, & the action will lie —

The breach of the undertaking in Ass^t. must be alledged either in the very words of the undertaking, or in such as convey the same idea & any

1st Vent. 69 — looseness of statement in this point will be fatal — The day in Ass^t. is not material, so that

Sal. 1–3 / Stra. 21 — it may be laid on one day, & proved on another —

Of Assumpsit

In declaring upon a contract which the Stat of frauds makes necessary to be in writing it is not essential to state it to have been
L. Ray. 450 — in writing for that may come out in proof
In an action upon a special agreement the proof must tally with the declaration & the same consideration which is laid must be proved, & if their more, or other consideration
Co. E. 79 — Co. J. 149 — proved than was laid the Pltff must be nonsuited — The Eng. practice of laying several counts in one Declaration has not obtained in Con[t].* The advantage of that mode is that if you fail in your proof upon one Count
Doug. 628. — you may resort to another; & the disadvantages are that they are often needlessly put in for the purpose of enhancing fees —

*By Stat. it may be done [illegible]

Of the Defence to this action —

The gen.l issue is non ass.t — there are many special defences to this action by way of plea in bar, but most of them may be given in evidence under the gen.l issue — accord & satisfaction is a defence which must be pleaded — full payment is another defence if the pay.t be partial it is our usual custom to suffer a default to be heard in damages; in Eng. the practice is to give it in evidence in mitigation of damages under the gen.l issue
Bur. 9. — When there is a specialty it must be pleaded in bar —

Of Assumpsit

The Stat. of limitations in Eng. & in the other States is six years in case of a promise; but in Conn^t. it is three years - there has been much litigation upon the question what shall be sufficient to take a debt out of the Stat. - By some it has been supposed that a bare acknowledgement of indebtedness was enough to take the case out of the Stat., it being supposed to be evidence of a promise to pay the debt - again it has been contended ~~that~~ a payment of a part of the money, or the interest due was equivalent to an acknowledgement of the indebtedness & ~~a promise~~ evidence of a promise to pay - But with these principles the case in Gilbert & some others do not agree - again it has been by some supposed that the Stat. goes upon the ground of a presumption that the debt is paid if of more than six years standing, but this cannot be the just way of considering the business, for whenever the Debtor does any act recognizing or rather not denying the existence of the debt, such debt is recoverable the Stat. notwithstanding, as if the Debtor devise his estate to pay his honest debts, those which were barred by the Stat. as well as others must be paid: so if he advertise that if his Creditors will exhibit all their just demands he will pay them, he is comptettable to pay as well those barred by the Stat. as others - But the true criterion is

this, that whenever the Debtor does or says ~~that~~ which amounts to a waver of the right which the Stat. gives him, he never can afterwards resort to it — & part payment is evidence of such a waver, tho' not conclusive evidence; for if it be accompanied with a declaration that he will not pay the residue or the like, he is not any further holden — A mere acknowledgement of the existence of the debt is not enough to take the case out of the Stat, unless done in such a way as is evidential of ~~such~~ his intention to wave the benefits of the Stat.; or at least if the acknowledgement be in such terms as shew that he does not intend to wave his legal advantage, he cannot be deprived of the legal privilege which the Stat. affords — In short the doctrine of waver seems the only one which reconciles all the authorities — The question has been decided upon this ground in the Circuit Court; & in that case tho' the paym.t which was urged as taking the case out of the Stat., was made a short time before the Stat. attached, it was considered as a waver of all the time before the paym.t made — & in the margin are the cases upon this point generally. When the Pl.ff has used due dilligence to assert

2.d Cond. 151
2.d Bur. 1099
Sal. 29.
Cowp. 629.
Carth. 470
2. Ray. 389.
421 —
5.th Bur. 2628 —
2.d Ray. 1101.
Gilb. Law of Ev. 126

his claim, but through the informality of the process fails of a recovery & by this means the Stat. has run upon his demand, he will not thereby be barred, at least he will not if he renew his action within a reasonable time; for if in such case the Stat. be pleaded he may reply the former proceedings had in due season & it will prevail—

The Stat. does not run against the claims of an Exr. or Admr. untill a year after the
Blacks. 1131. Creditor's death, if it had not attached in his life time— It is here to be noted that in case of presuming a waiver of the Stat. from the circumstance of payt., it is not enough, where the debt is by bond to shew an indorsement within the time limited by the Stat. for such indorsement might be made by the holder of the bond merely to furnish himself evidence, when there was in fact no payt. made; but some kind of additional evidence of actual payt. must be produced sufficient to convince the triors that there was a bona fide payt. made; what degree of proof in such case must be had is not definable further than it must be satisfactory & this often may be very slight, & depends upon the circumstances of the Case— The Eng. Courts suppose that if the endorsement be made before the Stat. attaches, that of it-self is sufficient; but it is doubtful whether our Courts would adopt the distinction, as the reason does not seem solid, for the

Of Assumpsit —

The Eng. mode of pleading the Stat. of Limita-
-tions, is to plead non ass^t. infra sex annos, un-
-less it be in cases where the promise is more
than six years standing but the right of action
did not accrue untill some time after the pro-
-mise, in which case the plea is ~~non ass^t. in~~
-~~fra~~ actio non accrevit infra sex annos, for
in cases of this kind it is of no importance
at what time the promise is made provid
Sal. 424. the right of action ~~didn't~~ accrued within ^years^ six
& the same rules of pleading obtains in the
State of N. york, & other states where their
Stat^s. are copies of the Eng. — but a clause in
our Stat. of frauds cuts off this destinction,
for by that no contract or promise of more
than 3 year's standing will support an action
unless it be in writing, so that the time of
the undertaking & not that of the accruing
of the action, is always the time from which
the Stat. begins to run — Our mode of plead
-ing is not non ass^t. infra tres annos, but
a set formal plea of the Stat. in bar —
It has been a litigated point, & is still, especi
-ally in this State attended with no small de-
-gree of doubt & confusion, whether the Stat. of
limitations extends to actions of Ind. Ass^t. or
whether it reaches only special agreements

& contracts, such as are the proper subject of a special Asst. In Eng. it is settled that Ind. Asst. arising out of frauds are not barred by the Stat. - But on the other hand it is settled that where the action is brought for money paid by mistake, the Stat. is a good bar - & that it runs not merely from the time of discovering the mistake but from the time of the mistake itself - Neither is it discoverable from the Eng. authorities, that money got
Doug. 630 by extortion can be recovered after the 6 years. In Cont. it seems to have been the opinion of the Courts that the Stat. is no bar to any action of Ind. Asst. The just rule would be that all those cases which would be the ~~just~~ proper subject of a special Asst. should be barred by the Stat. & that not all actions of Ind. Asst. should be clear of the Stat., but that all those which were not founded on contract or any agreement, but arise out of mistake or fraud should be clear of it & not affected thereby - this however, is mere speculative reasoning & is not supported either by the decisions of the Eng. or Cont. Courts -

Tender is another defence to this action - It must be pleaded to ~~be~~ have been made, on the day mentioned in the contract as the day of performance, & that the Deft. ever ~~has~~ since has been & still is ready to pay the same & now brings it into & offers it

in Court — & if there was day set in the contract, the plea after stating the tender must aver that the Deft. always was, as well before as after the tender ready to pay & still is &c — In case the tender was of other articles & not of Cash, it is sufficient to plead the tender at the time & place, for by the refusal, the tenderor does not become the bailee of the articles, as is the Case when there is a tender & refusal of Cash — When there was an actual refusal, it is ~~further~~ not necessary to ~~observe~~ go further than is above stated; but when the Creditor did not appear at the place of tender & there was no actual refusal it is further necessary to alledge that the tender was made upon the utmost convenient part of the day, for the Creditor

Sal. 623. 5 Co. 114 Cro. J. 13

has the whole Day to receive his pay, or ra- — then to appear at the place appointed for recep[tion] — Tender upon a quantum valebat is good upon

Stra. 576.

the maxim ~~that~~ id certum est quod certum redi[po]- — test — & upon the same ground it is good in Book debt — Infancy is also a good defence to this action, & is pleaded by simply alledging in form that at the time &c the Deft. was a minor under the age of 21 years &c — the replication of necessaries to this plea is very vague & genl. in practice — it should seem proper that it should state that the necessaries were suitable to the Infant's condition but the practice is otherwise, & the jury are left to decide —

The plea of foreign attacht. in certain cases is a ~~perpetual~~ compleate bar — When judgt. has been render-ed against the absconder & a Scirefacias issued the demand in which, if equal to, or greater than the debt due from the Debtor thus factorized, he may plead it as a final bar to any suit of whatever nature brought against him for the recovery of the debt by the absconder; & in his plea he must alledge the proceedings upon the foreign attacht. — But if the sum demanded in such Scirefacias, or actually paid upon the origl. execution, ~~was~~ be less than the sum due to the Plff. it will be a bar pro tanto only — If the Deft. be only served with a copy ~~but~~ & no judgt. rendered, nor scirefacias issued, he cannot plead the foreign attacht. — but the Court in such case will always continue the Cause untill the matter of the foreign attacht. is decided —

Another defence is a composition with creditors which is a bar to all kinds of suits on contract when the Plff had accepted of the compromise —

Another defence to this as well as all other actions upon contract, is usury — in pleading which the word corrupt agreement, or corruptly agreed is essen-tial — the plea must alledge that more than after the rate of 6 pr. Ct., to wit, &c (mentioning the sum) was secu-red &c — & if it were true, & yet no usury, as if the contract were made in N. York & for 7 pr. Ct., the Plff should shew this in his replication & not take issue upon the plea —

Of Assumpsit

Another defence to this action is a parol discharge, or release, & in pleading this it must be shewn that the release was made before the breach of the contract, for otherwise it would be void for want of a consideration, unless indeed it was accompanied with an actual consideration, which if the case, must be set forth, that the Court may judge of its legality - A written release is a complete bar to all actions to which it extends, if it purports to be for valuable consideration - & if not an actual consideration may be alledged & proved - In pleading a release, it must either be set forth verbatim, or substantially -

Another Defence is a performance - in pleading which it is necessary to set forth specifically the manner of the performance, that the Court may judge of its legality - Altho the foregoing defences may be pleaded & most of them regularly should be, yet by the Eng. law which is very lax in this action, most of these defences may be given in Evidence under the gen. issue and by our laws, all may be except acts of the Plff (viz) releases & parol discharges -

Of Book-Debt

The action of bookdebt is in many respects an action sui generis - In it all interested persons are allowed to testify to a certain extent - In this action too the deft. may, as in an action of account, recover judg.t against the Pltff for the balance if found in his favor - it covers, or supersedes many kinds of Ass.t as 1.st a quantum meruit - 2.d it lies for the price of an article which has been specifically bargained for & the price agreed upon - in cases of this kind where there is a special agreement strictly speaking the parties are not admissible witnesses except as to the quantity & delivery of the article, ~~the~~ & indeed the same restrictive principle holds in all cases of book debt; at least such was the former practice, & a recent determination of the Court of Errors seems to have restored the true principle, tho' for a considerable time past a very loose practice has prevailed of suffering the parties, in effect to testify all lengths in such cases, even to special agreements about the price - 3.d for a quantum valebat is another instance where this action lies instead of Ass.t - 4.th it is allowable in this action to recover money lent, at least, when lent in small sums, ~~it is~~ & at various times, the parties being such from their business & connections that it would not be probable any writing would be given -

6th It lies in the place of an Insimul computassit: or rather, such adjusted acct. may be blended with other items - & on trial such settled & adjusted part of the acct. altho' signed in testimony of the settlement by the parties, may be scrutinized, & any mistake corrected, but not by means of the testimony of the parties - 6th money had & rec. may in this action be recovered, provided it proceeded from contract, & an actual delivery over of the money by the Pltff to the Defft., but not otherwise - 7th things lent have been allowed as a good book charge when blended with other articles, but never when the acct. consisted of nothing else - & even money paid on Obligations for which no evidence was taken, has been allowed to be recovered in this action - but by a decision of the Court of Errors this is now put an end to -

To such lengths has this action got, from small beginnings that any kind of chattels, personal except Negroes, has been allowed as a book charge, & any kind of services - Upon the trial the books must be produced; tho' if none existed before, the acct. may be made upon the spot - The orig. entries ought always to be produced if demanded, or else no credit will be given to the acct -

Of Debt—

At com. law debt was formerly the only action
for the recovery of a sum certain, upon contract
either written or unwritten— But this action ad-
mitting the defendant to wage his law, has in its resp-
-ects parole contracts almost entirely given way
to the action of Asst— since the Stat. of Westminster
creating that action— In Cont. the wager of
Law never obtained, & in the State of N. York it is
abolished by express Stat— & yet the action of
Debt has never been made use of in Cont. in
case of parole contracts— The idea of a contract
is essential to the maintenance of this action—
Where there is an express contract special
Asst. is concurrent with Debt— & where there
is an implied contract Ind. Asst. is concurrent
with it— It will lie for a quantum valebat
because, it is capable of being reduced to a certai-
-nty— It will lie for money in the hands
of a Sheriff, for he is supposed to contract with the
Creditor whose money he has collected, that he
will pay such money over to him when
collected— Asst. however is by far the most usu-
-al remedy— For the recovery of a Stat. penalty
Debt is a very proper & useful action, & is con-
-current with an action upon the Case founded on
the Stat.— Where there is a Covenant for a sum
certain but no penalty annexed to its violation
the action may be either Debt or Covenant—

Of Debt

When there is a Covenant to do a certain act guarded by a penalty, either the action of Covenant or Debt will lie; & yet they are not concurrent, for if the action be for the penalty, it must be Debt, but if it be upon the breach of the covenant, the action must be Covenant taking no notice of the penalty, neither in that Case is the penalty any rule of damages, for the recovery may be either more or less than such penalty according to the opinion the triors may entertain of the real damages - In case of a Bond for money either single or penal, Debt is the only action which can be brought — If debt be brought upon a Bond given for an illegal consideration which illegality will appear by the condition; the most correct mode of defence is to pray oyer of the bond & condition & after reciting the condition so as to make it part of the record demur to the Plff's declaration which is now in the same situation it would have been had he stated such condition in his declaration at first — But if the bond be single, or the condition tacked to it be not a true exposition of its condition, oyer will be of no avail; the mode therefore is to plead the illegallity of the Contract specially & support it by

proof either written or parole — for to shew an illegal consideration parole proof is admissible, but never to shew that the Bond was without consideration —
Com. 906. 2d Wils. 445.

A written contract if it carry on its face an impossible condition is void — i.e. if the impossible condition be interwoven with the contract itself it is void — but say the Eng. Books if the contract be thrown into the form of a Bond with a condition which is frivolous, or physically impossible, the Bond is good & the condition only is void — tho' there seems no very good reason for this distinction in favor of Bonds with impossible conditions, yet it ~~is~~ has got such firm foothold as not to have been attacked even in this State — If after the execution of the bond the condition becomes impossible to be performed either by act of God, by act of law or by the act of the Obligee, the bond is discharged
Com. 906.
So too if the bond be in the alternative to do one of two things, & one of them becomes impossible by either of the above mentioned means, it is said, tho' perhaps with no very good reason, that the Bond is discharged — sed de hoc quere, for a late Case it is laid down that one part of the alternatives becoming impossible by act of God was no excuse for not performing the one which remained possible — perhaps had this impossibility proceeded from the act of the obligee the case would have been otherwise
1 Bos. & Pul. 242

Of Debt

The defence in this case, is by pleading the fact of the intervening impossibility & supporting it by proof either written or parole, for both are admissible —

In the case of a joint Obligation, if one of the Obligors only is sued & no advantage taken of it by way of abatement & judg.t be rendered in chief against the def.t [for if he do not take advantage of it in abatement he cannot upon the trial, for it is his deed, tho' not his sole deed, consequently upon non est factum he cannot object to the deed in evidence] if such debtor prove to be bankrupt, no action can be brought against the other Obligor, there can be but one judg.t rendered upon such an Obligation — but if the Obligation be ~~joint~~ several, or joint & several, the Obligee may sue all the Obligors severally either in successive actions or at the same time — for he may pursue all the Obligors seperately untill he obtains a satisfaction — But in tort it is otherwise, for a judg.t against one, where there are several joint trespassors, is a bar to any process against the others — Altho' where there are several joint & several Obligors, you may sue them either jointly or severally, yet you can not include more than one in the suit without including all — By a Stat. in Con.t when one of several joint debtors lives out of the State, service

upon such as live in the State is sufficient, & if such as have not notice of the suit are aggriev-ed they may be relieved by audita querela, in which, if found for them they will be enti-tled to just damages as well as costs— When there is a bond given to do an act, as to convey land Chancery will compel a speci-fic performance, & not turn the party over to his remedy at Law upon the penalty, if he

2 Vez. 3?3. prefer a specific performance — When the contents of a joint Bond is recovered out of one of two joint Obligors, he may by bill in Chancery compel his coobligor to pay his just proportion — In Cont. the same remedy is given by action at Law, by writ of contri-bution — When there is a contract for a sum certain, the rule of damages is the debt & damages for the detention, which in Eng. (& of late in Cont. also) is the int. from the time the debt became due where a particular time is set for the pay.t— When the contract is for the delivery of a particular article, the price of the article at the time it was to be del.d is the rule of damages — When there are joint & several Obligors & one of them dies, the action lies against the survivor only; but if he prove to be a bankrupt Equity will furnish a remedy—

2d Vez. 377. against the representatives of the deceased — If both the Obligors be dead, the action must be brought against the Representative of the last surviving Obligor; but if he be a bankrupt Chan. will furnish the Cred.r the same relief as in the foregoing case, against the Representatives of the other — If the bankruptcy of the surviving partner, or of his Exr. can be ~~satisfactorily~~ made out to the satisfaction of the Court, in Conn.t, the Court will grant relief in Chan. against the Representatives of the solvent obligor, without ~~the~~ the ceremony of a suit & a non est inventus return of an Exn. — It is not improbable ~~that~~ our Court would sustain an action at law against the Representatives of the ~~first~~ deceased obligor, on failure of the survivor, but the experiment has not been tried — The rules of proceeding in the case of joint, & joint & several contracts are applicable to all other actions properly adapted to the several species of such contracts, as well as to the action of debt —

Cro. Car. 539. Hob. 206. In Eng. in all cases when an Exn. has not been taken out within a year & a day after signing final judg.t, either an action of debt on judg.t or a scirefacias must be brought in order to obtain the benefit of such judg.t; & it is presumed ~~that~~ within the year & day no action of debt on judg.t will lie — In Conn.t an Exn. may issue

Cl...ce queue & vide Sal. N.P. to the contrary.

after a year has elapsed, & perhaps any time within fifteen years without a scirefacias, but the time seems not to be definitely fixed - & upon this ground our Courts have resolved that no action of debt on judg.t will lie when Ex.n can be had without it - The Circuit Court have however determined that such action will lie after a year & a day - probably upon the ground that the Pl.ff would be bettered by it, by means of recovering interest on the first judg.t but that reason seems not well founded as by our law in Con.t no int.t is allowable on judg.ts The true criterion seems to be that this action will lie whenever the circumstances of the Cred.r would be bettered by it, as if through length of time (whatever it be) an Ex.n can not be obtained, when an Ex.n has been returned satisfied by a mistaken levy, so that the benefit of it has been lost - so too when a judg.t has been recovered against a bankrupt who has absconded, this action is allowable to enable the Cred.r to secure his debt by foreign some debtor of such absconder - Debt on judg.t also lies upon a judg.t obtained in an other jurisdiction, in which case the orig.l cause of action cannot be enquired into, but the Copies of such first judg.t are conclusive evidence of a right of recovery unless it

[Margin note, partly cut off:] de hoc ... Quere ... [illegible] ... Debt on judg.t ... [illegible] ... less than ... years & no ... [illegible] Declarat.n ... debt on judg.t

can be shewn that such first judg.t was obtained by fraud, in which case ~~[illegible]~~ it stands the same as if no judg.t had ever been given. But this difference is paid in G. Britain only to the decisions of Courts within the the Realm, & not to foreign, or Collonial Courts — Such too was formerly the case with our State Courts in relation to one another, but by the confederation & fed.l constitution, full faith & credit is to be given by one State to the public acts of another; & it is presumed that under this comes the decisions of the Courts of the respective states, & if so the ~~decisions~~ judg.ts of the Courts of one State are not to be considered in the light of a foreign judg.t in the Courts of another State — Where the judg.t upon which the action is brought is ~~not~~ con-sidered as a foreign judg.t, the orig.l merits of the case may be looked into, but the onus

Doug. 1. probandi is upon the Deft., for the judg.t is pri-ma facie evidence of an indebtedness — In an action of debt upon a bond to save harmless, if the terms of the condition require a positive specific act to be done, it is not enough for the Deft. to plead generally that he has saved the Pltff harmless, but he must go on & shew how he has saved him harmless, (viz) by doing the very act required by the condition —

But if the condition be merely negative, viz. not to do a certain thing, it is sufficient to plead generally that he has saved the Pltff harmless. Another defence against bonds of this kind is non damnificatus, in which case it will not do for the Pltff to reply generally that he was damnified, but he must shew in what particular he was damnified —

1 T. R. 384 — 2 Lev. 425 When there is a bond to perform Covenants the Deft. must not only plead performance, but must shew how he has performed the covenants — But if the Covenants consist of a great variety of matter, to prevent loading the Record the Court will permit a gen. plea of performance, in which case the Pltff must reply over & assign a particular breach upon which he will rely, & the rule in this case is to shew only a single breach be there ever so many: but when on

2 Burr. 773. 1 Bur. 227. Doug. 367. application to chancer the penalty, the hearing respecting the damages is had, the Pltff may shew all the breaches committed — A penal bond given to secure the paymt. of a sum in several instalments, is forfeited on failure of paying any one, & an action immediately lies; but the penalty is chancered down to the sum due. when the action brought, & for every subsequent failure a scire facias lies on the orig. judgt. & a new Exn. issues —

2 L. 192. But in the Case of a single bond no action can be brought untill failure of the last paymt. — If such contract be by parol an action lies upon

failure of the first payt., & according to the Eng. mo. the entire damages are given — It is presumed that in Cont. the several breaches furnish each a right of action to recover the amount of each instalment — It is a general rule in the Eng. Law that the evidence of the destruction of a Contract must be of as high a nature as the Contract itself, i.e. a sealed instrument requires a sealed release &c, but this rule does not extend to Bonds with a condition, & the reason given is that the condition is not a matter under seal & therefore may be discharged by matter in pais so that payt. or performance may be pleaded to such a Bond & proved by parol — But in the Case of a single bill payt. is no plea but there must be a release under seal — This rigor is in one case softened by Stat. which allows proof by parole of payt. at or after the day of payt. mentioned in the bill, under a plea of solvit ad diem & post diem — There is no such artificial distinctions between bonds in Cont., but payt. is a good plea to all, & the plea may be proved by parol — Tender is an admissible plea to no species of contracts in Eng. unless made at the day the payt. became due & must be so pleaded — In Cont. tender may be made

Of Debt —

at any time before the pleadings are closed to the jury, provided it be sufficient to pay the debt interest & Cost to the time of the tender made —

In declaring upon a bond it is necessary in Eng. & indeed every where else except. Con.t — to make a profert; & tho not strictly necessary here it is always done; & it is equally necessary here as in Eng. to produce the bond or other obligation in Court upon oyer prayed — In an action on a bond conditioned to perform an act upon the happening of a certain contingency, as the return of a Ship, ex. gra., the Deft. may plead that special matter, towit, the not happening of the contingency, in excuse; & then the Plff is to reply by taking issue upon that fact in all cases except in a suit upon an arbi-tration bond, when the Deft. ~~rep~~ pleads no award, the Plff must not only reply an award

Sal. 138. but must also assign a breach — The Eng. mode of declaring upon a Bond made out of the realm is, (if at Madrass ex. gra.) to declare upon it as made at Madrass, towit, in London, & in many of the States the mode is the same, particularly in N. York — but the Con.t practice is to mention the true place only —

Of Debt —

Bonds &c tho' not negotiable so as to empower the assignee to sue for them in his own name yet when transferred by the Obligee cannot be claimed by any one to whom the Obligee's
1st P. Wm. Rep. 619. estate falls, as assignees, Exrs &c —

A bond through length of time may become irrecoverable, i.e. the presumption after such a length of time, is that it has been paid; but this presumption may be destroyed by proof to the contrary; tho' a small matter of proof will not be sufficient — The time after which a Bond is presumed to be paid is twenty years, the way to plead when sued upon such a bond
1st Burr. 432, is to plead full paymt & give the length of time
Cowp. 109 - in evidence. If there be endorsements upon the bond purporting to be made after the twenty years have run & such indorsements are un-supported by other evidence, they are not con-sidered as proper evidence to be left to a jury but if they bear date before the expiration of the period of twenty years from the date of the
Stra. 826 - Bond, they are said to be proper evidence to be left to the consideration of the jury — perhaps there is no very sound reason in the distinction

When a Debtor is indebted to ~~several~~ the same
Cro. Eliz. 68. 2 P. Wil. 308 - Credr in several contracts, & makes a paymt he has a right to direct to which debt the money shall be applied, but if the payor give no directions,

Str. 1194 at law the payee may make the application to which debt he pleases, tho this doctrine is contro-verted by some— In Chan. however, the rule seems to be that if one debt carries interest & the other does not, the payt. when no directions are given, shall be applied to that which carries interest—

Accord & satisfaction is a good plea in bar to an action on Bond, but the satisfaction must con-tain a legal & valid consideration & must be of a collateral matter, for a less sum, or quantity in specie is no good satisfaction, un-less it be rec. before it was due by the terms of the contract, in which case perhaps it may do— an Equity of redemption is said not to have such a legal value as to constitute a good consideration altho a pepercorn has—

In a Release the most universally operative words which can be made use of is all demands The idea may, perhaps, be expressed as effectually by other words, but no one word has so extensi-ve a signification as this— It extends to a release not only of all matters then due, but also to notes payable at a future day, for they are debitum in presenti tho' solvendum in futuro But it does not extend to the release of Coven-ants then in existence but unbroken, but Sal. 58 which may be afterwards broken, so as to raise a future indebtedness; nor to a growing rent in

which case it is certain that a debt will
become due at a future period, for in
these instances there is no debitum in pre-
-senti – & whenever the instrument is of such
a nature as may or will create an indebt-
-edness, if there is no present due with a
day of pay.t given, it will not be released
by the gen.l expression, <u>all demands</u> –
It has been settled in Con.t that a release of
all demands, operates so as to release a Note
which had been assigned by the releasor,
but the releasor in such case is liable to the
assignee in an action on the Case, & so indeed
is the releasee, if it be in proof that he
knew of the assignment at the time of tak-
-ing the release – A release of all Covenants
will extend as well to those which are un-
-broken ~~as well~~ as to those which are broken –
A Covenant not to sue a Note within a
specified time can not be pleaded in bar to
an action on the note within that time,
but the agrieved party may have an action
for a breach of such covenant – But a cove-
-nant never to sue a Note at all is a good bar
for it operates as a release & should be so plead-
-ed, for it is a rule that whatever an instrum-
Doug. 6 -ent legally purports to be, as such should it be
Blackst. pleaded – Altho' Debt is always brought for a sum
1221 – certain, yet it has been in modern times decided that a less sum
than the sum declared for may be recovered

Of Covenant–

The action of Covenant is, in many respects simi-
lar to the action of Ass^t. A Covenant is no more
than a promise under hand & seal– there are no
certain technical words necessary to make a
Covenant; any form of words from which it
can be gathered that it was the intention of the
1. Rol. 518– parties to covenant with each other is sufficient.
The covenants in a Deed ~~of~~ of sale are two, first
Covenants of warranty, & second covenants of seizin
relative to which, with the remedies, vide No. 4–94–
In leases there are always covenants for quiet
possession, but such covenants are construed to
extend only to legal & rightful disturbance of
the possession, & not to cases of tortious eviction
Hob. 25 Co. 6. 213 for in such case the tenant can have his recom-
pence in law against such wrongful intruder–
Covenants are divided into personal & real,
the former relating to personalty & the latter
to the realty– Covenants real, descend upon
the death of the Covenantee to his heir, & if
broken after such descent the right of action is
in the heir; but if the breach took place in
the life time of the Covenantee, but was not
prosecuted, the right to the damages becomes
personal & when recovered would be personal
estate & for this reason the right of action
in such cases is in the Executor– But all
Covenants respecting the personalty, descend on
the death of the Covenantee, to his Ex^r. whether broken or not–

In case of the decease of the covenantor, the lia-
-bility upon the Covenants real descend to the
heir, unless broken living the covenantor in
which case the action must be brought against
the Exr. if not prosecuted before the death of sd Covenantor
1st Lev. 25.229 1st Wils. 4 — & in like manner the liability upon the per-
-sonal Covenants devolve upon the Executor.
In Cond. it may be a question whether the
benefits, or the liabilities as the case may be
upon Covenants real shall descend to all the
heirs jointly, or to such only as have the real
estate allotted to them — tho' it should seem
that the latter method would be the most proper.
When the Lessee assigns his term the assignee is
in some cases liable to, or benefited by the cove-
-nants in the lease from the Lessor to the lessee
(for the benefits & advantages are always reciprocal)
& in some cases he is not — The rule is, when the
Covenants upon the thing in the lease, & that
is in being at the time of making the lease,
the assignee, whether mentioned in the lease or
not, is bound by it, as if it be to keep a certain
house in repair which was on the land at the
time of making the lease — But if the covenant
was conversant about something that was not
in existence at the making of the lease as to build
so much stone wall on the land, the assignee would
not be bound to do it, unless the Covenantor ex-
-pressly mentioned assignees in the Covenant —

Of Covenant

But the assignee is not bound by a covenant to do any thing off from the land, as to build a house in another place altho the words of the covenant extended expressly to assignees— The assignee is bound in case of a negative as well as of a positive covenant, as to leave so many acres of the land untilled annually— But the assignee is never liable for breaches previous to the assignment— In all the foregoing cases the assignee is liable in consequence of possession, for if he assign the term to another, he is exonerated & his assignee becomes liable — & by Stat. of Hen. 8th, if the lessor assign the reversion, the assignee of the reversion stands in the place of the lessor who was the orig. reversioner, for rent & all its attendant circumstances is incident to the reversion— In all the cases above noticed the lessor is at his election either to pursue the original lessee or the assignee; for altho the assignee is liable in many of them, the lessee is not exonerated unless the lessor choose to consider him so, & a reception of rent from the assignee is a sufficient intimation of the lessor's election & exonerates the lessee— The rights are reciprocal in all these cases for if the lessor does not perform his part of the covenants, the assignee is entitled to his action against him—

The assignee of a part of the term only is never liable to the lessor, but the lessee only—

Margin notes: 5 Co. 16. — Cro. J. 125. — Sal. 109. — Plowd. 351. — Doug. 1. 2d. 735. — Sal. 18.

Of Covenant

When there is a voluntary Covenant to do, or convey a certain thing, without any consideration, it will furnish a ground for an action at law – but no more than nominal damages will be given – But Equity will not compel a specific per-formance of such a covenant, unless the thing covenanted to be done was a duty
2 P. Wil. 176 an incumbent duty upon the covenantor,
3 Bro. C. 13 – as to provide for the support of his family.

Where by a Stat. made subsequently to the Covenant, a covenantor is prohibited per-forming his engagements, he is discharged at Law – yet if it remains lawful to perform some part of his engagement equity will enforce a performance of such part of the covenant as is not prohibit-ed – As in the Case of a covenant to renew a lease of ecclesiastical lands for ninety nine years – when a subsequent Stat. restrained the duration of such leases to forty years, tho' the covenantor for the renewal was released at law; yet Chan. compelled him to renew for as much time as the law would allow, viz, 40 years –

Action of Account

This action is founded on contract express or
implied – At com. law this action lay against
a guardian in socage, a bailiff, a reciever or
a factor; & lay not against the personal repre-
-sentatives of the parties – The deft. in this action
whether Bailiff, steward or reciever is considered
as a trustee, who has rec.d the property of the Pltff
to make profit of it for him & to render an acct.
1 Wils. 73 – when required – A bailiff is, properly speaking
one who has rec.d any species of property from
another to make the most profit he can of –
A bailiff has a lien upon the property put
into his hands, for his own expences & wa-
-ges & is only accountable for the surplus
after they are deducted – A reciever in
this, differs from a bailiff, viz. he recieves
only money to make profit of for his prin-
-cipal, whereas a bailiff recieves all sorts of
property – the Reciever must account for
the entire sum entrusted to him, & is allowed
to retain nothing for expences; but is allowed
by way of compensation ~~a~~ a stipulated sum
C.L. 172. having no lien upon the money in his han[ds]
Do – This action has been extended by Statt., so that
it lies for one tenant in Common of lands against
C.L. 89. another for the profits of the land & against the Execu-
tors of such tenant – & for one Exr. against another –

Action of Account

In Con^t. the law is almost precisely the same with Eng. relative to this action, it may there-fore be concluded that this action will lie here against one who has rec^d. the rents & profits or debts of another, or has been employed to pay over money to a third person, or has been entrusted with goods to be merchant-

1. Swift. dized & made profit of, tho' a different remedy

43 - has generally been resorted to -

This action always supposes some privity be-tween the parties, therefore it will not lie for any species of torts, or any abuse of a thing bail-ed, unless the article bailed was to be merch-antdized with & made profit of - & not in case of common bailment to keep, if there should not be proper care taken of it, or it should be misused - It will not lie against a disseisor or trespassor, even after possession has been regained by the disseizee -

It is always the case in Eng. that the Pl^{ff} in this action might insted of proceeding at law may file his bill in Chan. against the Bailiff to account, but it may be question-ed in this State whether the Pl^{ff} can be allowed his election in that particular because in Con^t. there is a positive Stat. excluding

the bill in Chan. when there is adequate remedy at Law, as there seems to be generally in matters of account — Where there is a Bond with a penalty, to compel an accou-nt, the remedy is optional either by ac-tion on the Bond, or by action of Account And in like manner if their be a Covenant between the parties to acc.t the action may be either Covenant or account — Where there is an express promise to acco-unt the action may be either special ass.t or account — but where the promise to account is merely an implied one it seems to be doubtful whether any action but that of account will lie —

The gen.l issue in this action is no bailiff & reciever — One thing peculiar to this action is, that it is necessary there should be two judg.ts — the first judg.t is that the Deft account, from a particular day, the decla-ration therefore must state the period during which an acc.t is claimed — The first defence must be of such a nature as will shew that the Deft ought not to account, which can hardly be any thing else than the gen.l is-sue or the plea of fully accounted — a release of

1 Ray. 57.

all demands is however a good plea in bar, for this shews that the Deft. has fully accounted – If the parties have met & settled all accounts, this will also bar the action – It is difficult to express what is the meaning of fully accounted when spoken of as a bar to the action – for if one has recd. of another 100£ for which he is to account & the receiver has paid 50£ in Cash, & a like sum in goods or in services rendered he has in one sense fully accounted but not technically speaking; for that notwithstanding, judgt. will be rendered quod computet, against, & auditors must then in all cases be appointed to enquire into & adjust the accounts of the parties & make their award to the Court upon which final judgt. is rendered – & if the auditors find a bal. in favor of the Deft. they award the sum found in his favor for which the Court will give judgt. as well as for the Cost against the Pltff. – Before the auditors the parties are admitted to testify – the genl. issue before audrs. is nothing in arrear – Nothing is allowed to be pleaded before the auditors which might have been pleaded in bar

3. Wils. 73 –

Of Fraudulent Conveyances –

1st – When the propy whether real or personal is deliv'd over into the hands of the grantee –

A conveyance to defeat a Creditor is fraudulent & void; but a conveyance to avoid a Credr – is not al-ways fraudulent – As when one grants away a favorite piece of land for the express purpose of keeping it out of the hands of a Cred^r; such convey ance is not void as it respects such Credr – provided ~~provided~~ there remains a sufficiency of propy to satisfy such Creditor's demand – But to convey away a favorite piece of personal propy in such manner, is fraudulent; & so it is the conveyance of the favorite piece of land if enough be not left – All such conveyance to avoid or defraud Creditors is good & binding as between the grantor & grantee, & them only – But if the grant is purely voluntary without any design to defraud Credrs Chan. will admit proof to shew that the parties considered the conveyance to be a trust & upon being satisfied of the fact will decree the grantee to reconvey – & if such voluntary conveyance be incomplete Chan. will not interfere at the petition of the grantee, to decree a completion of it – It is upon principles of policy that fraudulent convey

Prec. on Ch. 2d. 242-

-ances to defeat Creditors are held to be binding between the parties* it is a severe penalty upon the Grantor for attempting to defraud his Creditors — such conveyance is totally void as it respects the Credr. & the Grantee, tho' he has a good title as against the Grantor & such as claim under him, has none at all against the Credr. so attempted to be cheated, for he may levy upon the land as the propy. of the grantor — but strangers can not question the validity of such a grant, but are liable to the grantee in trespass for intermedling with such propy. & in this case there is no difference between the prior & subsequent Credr., for if the grant was made for the purpose of defrauding one with whom the grantor was about to contract, the conveyance is as void as to him, as it would be to one whose debt was previously contracted; whether ~~that~~ the grant or had it in view to defraud that particular Credr., or only people in genl. with whom he should afterwards contract, the Case is the same, for the honest Credr. has an equi-=table claim upon the property of the

* 1193. It has been a question whether if a fraudulent grantee grant the land to a bona fide purchaser without notice, the land will be liable to the Creditor of the fraudulent Grantor, or can be held by an honest purchaser of such fraudulent grantee. 2 from Rob. on fraud: page 495 it seems that such Credr. or purchaser could not take the land after such bona fide sale by the fraudulent grantee & he after 1st. Sid. 133 Sza. 248 3d. Lev. 387 — Godbolt 161 — In Connt. there have been clashing decisions upon the point —

grantor, but the grant being without consideration, gives the grantee no equitable claim to hold the land, against one who has a juster claim – There is no difference between a fraudulent conveyance where there is no consideration, & one where there is a partial consideration, made for the same purpose, to wit, to defraud Credrs, in either case the grant, as it respects the ~~fraud~~ Credrs is void ab initio as for instance – A. has a farm worth 1,000, & conveys the same to B. who is a Credr to the amt. of 100£ only, & in satisfaction of B.s debt & for no other consideration – the design of this conveyance is to defraud other Credrs, the conveyance is void & the Creditors may take the farm from B. the partial consideration notwithstanding; & in such case if B. has surrendered up the evidence of his debt he must lose it, tho A. should afterwards be able to pay; for he having given up his security in order to help A. carry into effect his ~~fraud~~ fraudulent design, neither Law nor Chan. will interpose in his favor against A. if he refuses payt –

Of fraudulent Conveyances as they respect Purchasers – And 1stly of Real Estate –

Of Fraudulent conveyances

When a grant is made of real Estate & the grantor is left in possession of the title deeds & of the land also, it is a transaction calculated to ~~[illegible]~~ deceive & is a badge of fraud & whoever purchases the land under such circumstances & gets possession of the title Deeds, will hold the land against such fraudulent grantee, even if such ~~purchaser~~ subsequent purchaser knew of the existence of such previous fraudulent sale, at the time he made his purchase, & having paid his money for it will hold the land — But if the title deeds are in the hands of the purchaser the circumstance of the grantor's being in possession, is not of itself sufficient to mislead a subsequent purchaser, whose business it is to inspect the title deeds, tho' it may a creditor who trusts ~~the~~ grantor subsequently to such grant — consequently the first purchaser having ~~paid for the land &~~ taken into his hands the title deeds will hold the land against the subsequent purchaser altho' he might have paid for it — & indeed were it not so, the law making fraudulent grants good against the grantor, would be frustrated, for otherwise the grantor in such case would have nothing to do but to sell the land again to ~~get~~ regain his propy

Of Fraudulent Conveyances—

In Cont. the Law relative to Recording deeds prevents our having much to do with the fore-going doctrine respecting the title deeds being left with the grantor or not—

2dly Of personal propy— The law is equally strict in avoiding fraudulent conveyances of personal propy, as it is of real propy

If the grantor be dead the fraudulent con-veyance is good against his Representatives as it would have been against the grantor had he lived— But, as it respects Credrs the fraudu-

Pre. Rep. 585. -lent grantee is in the situation of an Executor in his own wrong— If we apply this doctrine in Cont. where land may be taken in satisfaction of an Exn. & we shall see that the Gran-tee of real property upon the death of the grantor, may as well be considered as an Exr. in his own wrong as the grantee of personal propy— whether it would be so considered or not is uncertain— It has been enquired — whe-ther the conveyance of a personal chattel can be considered as fraudulent & void against Credrs when a full price has been paid for it by the purchaser—

The true answer to this enquiry is, that if it be done with a design to defraud Creditors, & that be known to the purchaser, it will be deemed fraudulent

Cowp. 432. & void, & will operate upon the purchaser as a penalty for lending his aid to the fraud of the set-tler—

Of Fraudulent Conveyances

There is a difference between the claims of the prior & subsequent Credrs where the purchaser of a piece of Land has given the full value of it, ~~Land~~, but with an intent to assist in the commission of a fraud which takes effect, for the prior Credr may treat such conveyance as a nullity - but with the subsequent Credr the Case is otherwise, for the grantee having purchased the land before the Credit was given will hold it - but had the grant been merely voluntary, instead of the full value's being paid for it by the grantee, such grant would have been deemed void, the grantee having no equitable claim whatever to the land for which he had paid nothing, while the Credr tho' subsequent would have a just claim upon it.

A voluntary Conveyance upon a good consideration merely, & without a fraudulent intention, is void as against prior Creditors, if there be not a sufficiency of estate to pay such creditors left, because says the law, a man must be just before he is bountiful - & if the conveyance was merely on good consideration, & there be not estate enough left to satisfy existing debts it will be deemed fraudulent

Of Fraudulent Conveyances

But subsequent Creditors cannot interfere with such grants, unless done secretly & for the purpose of defrauding a subsequently contractor who was ignorant of such conveyance —

If there be a grant of property either real or personal, to one who is not a Credr; or is a Credr to a small amt compared with the value of the property, but the propy be left in the possession of the grantor, it is evidence of fraud; & any Credr either prior or subsequent, or any purchaser would hold the propy against such fraudulent grantee; & it would not alter the case ~~that~~ such Credr or purchaser was acquainted with the previous existence of such pretended grant — for the grantee in such case is a particeps crimin-is & is not to be favored — In case where the grant was for a real bona fide debt, or price, ~~or the property~~ but still the propy left in the hands of the grantor, or where the propy was only bailed to the possessor, a purchaser of the propy from the one in possession would, or would not hold it as the circumstances of the transaction might be — for in this case if the subsequent purchaser knew ~~that~~ the one of whom he purchased was not

the just proprietor he could not hold the propy neither could the prior Credr in such case levy, for there was no actual fraud in the case put- But if the nature of the transaction was such as that the probable effect of it would be to deceive purchasers & subsequent Creditors; such purchasers & Creditors will hold the property- & even if the subsequent Credr at the time of his levy knew that the propy did not belong to his debtor, yet perhaps he would hold it if he was ignorant of the fact at the time of trusting his debtor & was led to trust him, by the shew of propy which such possession enabled him to make. But if such possession, which is in the nature of a bailment always. whether the bailee was the former owner or not, be not calculated to deceive Credrs or purchasers they can not hold the propy tho' ignorant of the true owner- If however ~~a custom~~ possession do not accompany the sale of personal propy the presumption of fraud is so strong as to be rebutted with difficulty. The great difficulty in the Case of bailment is to decide when the transaction is calculated to deceive & when not- & this must depend upon the circumstances of each particular case —

Of Fraudulent Conveyances

In the case of a mere naked bailment, the propy is not lost by the sale of the bailee, usually. The Case of a horse lent or hired out, has been often the subject of litigation & differently decided. Cattle & Sheep may usually speaking be bailed with safety — tho' probably the circumstances of the case may be such as to expose them.

Our Supr. Court have decided that, where a father lends his daughter on her marriage, any propy so as to have the control of it in such manner as to prevent her husb.'s spending it, such propy shall be safe against Credrs & purchasers — & altho' this seems to be against the genl. rule, it being calculated to mislead, still it seems to be a well established exception, it being supported by three decisions.

In case of a mere charitable bailment, as to ~~keep~~ permit a bankrupt to keep necessary furniture which the bailor had taken on Exn & himself bid off & left in the use of such poor debtor, it has been decided that such bailment shall be protected —

Where the property purchased or levied upon was stolen by the person in possession, the original owner can always reclaim it of such purchaser — unless it be in the case when the article was lent to the thief, who borrowed it for the purpose of running away with it, which the law deems to be theft, in which it might probably be considered on the ground of a loan

In case of a grant or contract whether writ-ten or unwritten, the stipulations where-of are physically ~~im~~possible, but impos-sible ~~upon~~ to be performed by the contrac-ting party by means of his particular circumstances, the contract is binding, & yet Chan. will not compel a specific perform-ance, unless such impossibility arose from the obligor or promisor's own volun-tary act — When an estate is made to one conditioned to revest in the grantor upon the performance of a subsequent impossible condition, the condition is void & the Estate absolute — But when the impossible con-dition is ~~absol~~ precedent i.e. as when A. ma-kes an Estate to B. to vest in him upon his performing an illegal or impossible act, nothing passes by such grant —

It is a maxim ~~that~~ to make a valid grant the grantor must at the time of making the grant have either an actual or potential property in the thing granted — as if A. grant white acre to B. ~~when~~ he does not own it, the grant is void; but should A. afterwards pur-chase white acre the grant ~~& the grant~~ will inure to the benefit of B. provided in A.'s grant

to B. there was a covenant that he (A.) was well siezed of the premises; for tho' strictly speaking nothing past by the grant yet ~~Lint.~~ A. having covenanted with B. that he was siezed &c. is forever estopped by such covenant to say that he was not well siezed, & B. having also an equitable claim his possession will be good against third persons as creditors &c. - But if the grant to B. were merely a quitclaim without covenants of siezin, nothing passes to be by such subsequent acquisition by A. - The same is the case with personal, as with real estate A potential property is such as a person has in the future productions of his lands &c. & a
Ib. 32. grant of this is good - But the mere grant of such grain, or wool or the like, as one shall hereafter purchase, is void -

The foregoing is the law relative to contracts executed - With executory contracts it is different - i.e. such, wherein some new act is to be done according to the language of the grant. For if A. covenants with B. that, when he (A.) shall purchase white acre, he will enfeoff B. of it, or lease it to him or the like, such Covenant is good, & as binding as if White acre were then in possession of the Covenantor -

Of Fraudulent Contracts

The genl. rule laid down in the books is that fraud vitiates all contracts – This rule however is very inexplicit – for when the fraud is in the consideration only, the contract is good at law the fraud notwithstanding: but if it be in the execution of the contract it is void at law – In the former case the agrieved party is turned over to equity for his relief; for the fraud is not pleadable at law, except in Mercantiel transactions, in which any the least fraud is sufficient to annul the contract – And in Cont. it has been holden in our Courts of law, that when the fraud is total it is a defence – & the agrieved party may treat the whole as a nullity & bring Ind. Assu. for his money paid in such contract, or if he be the seller he may have trover for his goods, the same as if the deft. had gotten them without the pretence of a contract & even in Eng. tho' a total fraud is not pleadable in defence, yet where one has paid out his money upon a contract where the consideration wholly fails, either throu a total fraud or otherwise, Ind. Ass. will lie for the recovery back of such money – but such contracts have not been then considered as so wholly null as to lay the foundation of any other action as trover

Of Fraudulent Contracts

But when the fraud is in the execution of the contract, (as getting one to sign a different writing from the one intended by the person executing it,) all systems agree in its being a defence at law— But for relief against fraud in the consideration, application must be had to Chancery— If the fraud be total, Chan. will vacate the contract entirely; but if it be partial only it will so decree as to set matters right between the parties, either by vacating the contract or not as the circumstances of the Case require; i.e. if the thing which was the subject of the falsehood or deception, was the sine qua non of the bargain Chan. will so interfere; but if not, & it was only a circumstance which induced the purchaser to give a higher price merely, than he otherwise would have done, Chan. will not interfere but leave the injured party to his remedy at law in an action on the Case for the fraud— Whenever there is a very great inadequacy of consideration in a contract, if by the attendant circumstances it appears ~~that the~~ injured party did not act freely & understandingly, or when there is proof of imposed hardship, Chan. will give relief— the Books refer these cases to the head of fraud, & say the inadequacy of price is the evi-dence of it.

Of Fraudulent Contracts

Fraud consists not only in a suggestio falsi, but
also in a suppressio veri. it will make no
difference ~~that~~ that the vendor had given
a written warranty as to other things, if he
was guilty ~~of deception~~ of deception about
one, ~~he~~ it is a fraud — & in a case in Cowp.
where a note was sold, & the buyer in the endors
-ment engaged to take it at his own risque,
yet it being in proof that the seller made a
false representation to the buyer, whereby he
was induced to run the risque expressed in
the endorsement, an action for the cheat was
sustained — Whenever the seller warrants
a thing at the time of sale, an action on
such warranty lies if the warranty was false
& that whether the warrantor knew of it or
not, provided the warranty was calculated
to impose upon the purchaser — False affir-
-mations also ~~are~~ if calculated to deceive
are sufficient causes of action, as if the seller
should say that J. S. had offered him 30£ for
Cro. J. 4. 72. — 24 — 469. 197 — the horse which was the subject of the contract,
when he had not — but if the false affirma-
1st Sid. 20. 146. — tion was only matter of opinion, as if the
1st Lev. 102 seller should say that his horse was worth
Sal. 211 — 30£ when he was not, the horse being present, no action lies

Of Fraudulent Contracts—

But a false representation which is not calculated to deceive, will not constitute fraud as if the seller declare or even warrant his horse to be sound in every part, when the buyer is looking on & can see for himself, it is no fraud if the horse wants an ear, for it is not supposed that the warranty extended to obvious defects, or that the buyer was deceived by it— But if the buyer were blind, or the bargain was in the night when the purchaser might not be able clearly to descern such things, or if the horse were not present to the buyer so that he was deceived by trusting to the word of the seller, which he has a right to do, it is a fraud— Chancery will relieve against such cheating bargains, when there is any thing for it to operate upon, as to annul securities, compel a reconveyance of lands &c— But when the money has been paid, & you want'd to recover your cash. Chan. will not interfere, but recourse must be had to an action at Law for the cheat— If a contract is not carried into execution, & relief is sought against it Chan. is the only forum which can give relief— When the injured party has possession of the prop'y in the purchase of which he was cheated, the mode of seeking redress at law is to sue for the cheat affirming the contract—

Of Fraudulent Contracts

A mere naked lie unaccompanied with any advantage to him who tells it, if it is the means of injuring the person to whom it is told gives that person a good ground of action — It is said in the books, that if A. counterfeit B.'s name & by that sign an Obligation, B. can have no action for the fraud against A. because he has a good defence against the note — so too it is said that if one cause a satisfied Execution to be levied, no action for the injury will lie, because relief may be had by audita querela.

3d Term Rep. 51.

When there is an Obligation which the law makes void, & yet the orig.l contract remains unaffected by the law which avoids the security, it will revive when the obligation is avoided — & it seems that our Courts will sustain an action upon such contract, without such Obligation's being first sued & avoided in a regular course; but the Pltff must in such case tender the Obligation to the obligee, & if he will not take it lodge it in Court — Somewhat annallogus to the preceeding, is the determination of our Court in the case of the assignment of a Note, that if the obligor can be satisfactorily proved to be a bankrupt, the assignee may sue the assignor, without first suing the note & obtaining a non est upon the Exn

Of Fraudulent Contracts—

Contracts which are a fraud against 3.d persons are relievable against in Chan. even at the application of one of the parties to the fraud, & no assignment or subsequent renewal of the contract or security will purge the fraud or give validity to the contract— as ex. gra. if in a marriage contract A. promises his son B. 3,000£ on condition that C. the father of the young lady would give with her a portion of 2000£ & the settlement is made accordingly, but B. secretly gives C. a bond to pay him back 1,000£.

1st P. Wil. 469. Gil. 156. 1st Vez. 376. B. may avoid this bond, into whatever hands it may come, & so also may A. the defrauded party, if B. do not claim it— The same is the case of a fraud upon the creditors to

2d Vez. 307. a bankrupt & the like—

Cheating when it is not of that kind which affects the public, but is entirely confined to the cheated, is called a private cheat & the knave is liable civiliter only— But cheats which do, or may affect the public are called public cheats, such as selling by false weights & measures & & are punishable upon indictment by fine, imprisonment & pillory— When one cheats another by false tokens & false signs, such as shewing him ~~an~~ an invoice of goods or the like, made for the purpose, & by that means induces him to ~~purchase~~ trust him, by other means than his own personal address, such a person is called a common cheat & is punishable by fine & imprisont. but not by pillory

Of Fraudulent Contracts

Minors are liable criminalliter for such cheats, as are public offences but never civiliter to the person cheated — Fraud is said to be destructive of every thing in the nature of a Contract, & even of a judg.t of Court — When a judg.t is obtained by fraud the Eng. mode is either to move the Court to set aside the Ex.n, or apply in Chan. for relief — the latter of these is the Con.t mode — Or if the Ex.n be levied & the money collected, to sue in trespass vi et armis — In debt on judg.t the Court will always suffer the Deft. to prove fraud in the Pff in obtaining the judg.t, tho they never will enquire into the orig.l merits of the Case, unless it be a foreign judg.t; & a judg.t for the deft in such case never goes upon the ground of reversing the former judg.t, but upon the ground that there was no judg.t — Whenever fraud is made use of to obtain the shelter of a Stat. of limitations, the Courts will prevent the effect — as, exe. gra. in Con.t by Stat. one who takes usury if prosecuted within one year is subjected to a forfeiture; to evade this, the usurer gets some friend to prosecute him who will withdraw the prosecution at the end of the year, to prevent this the Courts have determined that no part of the time covered by such fraudulent interference shall be reckoned or shall be allowed in computing the time of limitation — & the same is the case where ever the like fraud upon the law is attempted

In some cases Ind. Ass.t is concurrent with an action of fraud, as when the money was got in to possession by

Of joint & seperate Debts under a Commission

The principle laid down in the Books upon the subject of Bankrupcy seems to be that, when a joint Comn. is sued out against joint debtors, the company creditors are to be paid first out of the Bankrupts' joint property, before their seperate Creditors can be allowed any thing out of such joint stock - & that, if the Comn. be against one of the partners only, the claims of his partner for what was due to the Company from such bankrupt partner, would stand upon the same ground as other claims upon the Company, & be preferred to seperate creditors - So too, that where the Comn. was joint the seperate Credrs. to be preferred in the disposition of the seperate property, & paid, before the joint Credrs. could be permitted to come upon such seperate propy. - The same is the Case mutatis mutandis when the comn. issues at the petition of the seperate ~~creditor~~ creditors against one of the partners - But notwithstanding that the above seems to be the doctrine of the Books, till lately yet in a late Book upon the authority of a case in Atkins that the Atk. 183. seperate & joint Credrs. in such cases shall be allowed to come in & recieve their pay pari passu out of all the propy. - But perhaps the Case in Atk. does not warrant the decisions - by that case it is settled that a seperate debt will support a joint Comn. but it does not say that the joint debts shall not be preferred in the disposition of the joint property; but perhaps it is inferable Ideo quere of the law on this point.

Supplement— Of Statutes—

When the Stat. does not point out where the penalty
is to go, if the Offence is of such a nature as to be equal-
-ly injurious to all, the penalty goes to the public, but
if any one has suffered a particular injury by the
prohibited act— he shall have the penalty— If a high-
-way be obstructed, ex. gra. contrary to Stat. & no one in
particular be hurt by it, the penalty or prosecution
goes to the public— & the public alone can prosecute
but if J.S. has been personally injured, the penal-
-ty in such undetermined Case, shall go to him, & he
alone must prosecute— for where a Stat. either ex-
-pressly or by implication gives a penalty, or any
part of it to an individual, he alone can prose-
cute— & in that case the Offence is not outlawed within
a year, as it is when the fine goes into the public
treasury— if however any part of the forfeiture goes into
the treasury it seems to be within the 12 Mos limitation

Carth. 396— When a Stat. is made explanatory of a former
3 Co. 31 one the Court are bound to follow it literally, & are
Sal. 534. Cro. E. 654. at liberty to indulge no constructions of such parts
of the former Stat. as are explained by the new one—

2 Lev. 227. A Stat. made subsequently to a contract, may al-
Vent. 306. -ter the mode of recovery upon such contract, but
cannot alter the essence of a preexistent right; as ex. gra.
if a Stat. should be passed ordaining that no deed of land should
be good without 3 Witnesses, it would operate on future con-
-veyances only— When a Stat. is made ordaining a particular
mode of proceeding, tho' there be a com. law remedy, still the Stat.
mode must be followed, this is the case when a new duty is created
by the Stat.— But if the Stat. neglect to point out the mode then the com. law mode may be followed

Supplement – Of Husb. & Wife –

The wife during coverture may, through the intervention of trustees, dispose of such propy either personal or real as was given to her to her sole & seperate use; & from some passages it should seem that she might hold, & dispose of such propy without the intervention of trustees – By will she may bequeath her personal propy so holden – But being by the Stat. of Hen. 8th prohibited to devise real estate, she cannot so dispose of lands holden to her sole & seperate use – But yet when lands are given to her sole & seperate use through the intervention of trustees with an express clause in the grant or devise giving her power to dispose of it by her will, or as it is usually termed, by an appointment in the nature of a will, such appointment when executed according to the power given, will be good & operative in Equity; but the Devisee is in that case considered as holding not as devisee to the feme, but as of the person who devised or granted it to her – The husb. cannot prevent real estates coming to the Wife by descent, but may disallow of any gift by Deed or Devise to her, unless given to her sole & seperate use – in case of a Devise to the wife however, Chan. will sometimes interfere to secure the benefits of it to the wife the husb.'s dissent notwithstanding –

It is a general rule that contracts between husb. & Wife are void, but yet in Chan. such contracts made either before or after marriage, or respect the marriage settlement, are good – & any conveyance from one to the other, or covenants made through trustees will be good – Any contracts made between them before marriage which from the terms of them are not to be carried into execution till the Determination of coverture are not void

 Supplement - (Of Bastardy) + (Of Marriage)

Our Stat. authorizing a just. of peace to bind over the person charged by the oath of the Mother of a Bast. child, with being the father of it, contains a clause from which it should seem, that the just. might bind over or not at his discretion - But this being contrary to the gen^l. rule in cases of that kind which requires the just. to bind over where he has no power to try the cause, unless the prosecutor withdraw ~~with~~ his prosecution, it is apprehended ~~that~~ the just. should not attempt to exercise his discretion in the case, the clause notwithstanding - And it has been repeatedly decided ~~that~~ such dismission by the justice is no bar to a new prosecution brought before the County Court, or (it is presumed) before another justice

Tho' prosecution upon the Stat. concerning Bastards, is criminal in its dress, ~~but~~ the end to be answered is entirely a civil one - And in conformity to the idea of its being criminal in its dress, no appeal is allowed from a judg^t. of the County Court; & yet it is settled that the depo^n. of the mother of the Child may be used on the trial when thro' sickness & the like it is impossible for her to attend personally tho' regularly a depo^n. is inadmissible in Criminal Cases.

Of Marriage - It appears by an examination of the authorities ~~that~~ marriage was originally at com. law a mere civil contract, & as valid when solemnized by a Layman, as by a Clergyman - & tho' the Clergy early laid claim to the sole right of solemnizing marriage & had power to punish the parties pro salute animarum when married by a Layman, they could not desolve the marriage - hence it may be argued in Cont. that marriages are not void solemnized by any Indiv[illegible]

Supplement — Of Infancy) Of Guard.n & Ward —

It is a rule that Infants are liable to punishment for misfeasance, but not for nonfeasance; as in the instance of a Stat.'s commanding something to be done under a penalty, the Infant unless mentioned in the Stat. will not be subjected to the penalty for neglect of performance — And in case of penalties for a misfeasance to which Infants are liable, there is this destinction in their favor; to wit, Where a corporeal punishment of the offence (it being neither treason nor felony) was not the orig.l legal penalty annexed to it, but is an additional penalty ordained by Stat.; as, ex. gra., if a Stat. should be made declaring that the tenant who commits waste should in addition to the forfeitures imposed by com. law, suffer the punishment of whipping, an Infant tenant would not be subject to such corporeal punishment, unless expressly mentioned in the Stat —

Guardian & Ward —

In Eng. when the father is dead, the mother is of course Guardian of the Daughters untill 21, if none other be appointed, but not of the Sons — In Conn.t she is guardian of neither sons nor daughters unless appointed by the Court of Probate — at fourteen the males have a right to choose their guardians, & at twelve the females subject to the approbation of the judge of Probate — & if at the age of election the minor neglect to choose a new guardian, the former one's powers continue, if any there were — When a father acts as guardian to a Child's property he is not to be allowed out of it for the Child's support or education, for he is entitled to his services — but it is otherwise in each particular with other Guardians — If the Infant's real prop.y be encumbered the Guardian ought not to disencumber it with the personalty — but with his own money chargeing interest

A Master who permits his Servt. to contract while in his service will continue to be holden for his contracts after dismissal, if such contracts be made before it could be known that he was dismissed – When a contract is made by a servant for the master, if reduced to writing & made a specialty, the Servt. must sign it in his master's name, for if he sign it in his own name merely the Master will not be bound by it, but the Servt. only – It is a genl. rule that Masters are liable civiliter for the torts of their Servts. if done at their request or in their business – Under this rule comes the liability of Sheriffs for the torts of their Deputies while in the execution of their Office; for they are liable civiliter for them, as well as for any neglects or mismanagement in their office –

Of Bailment –

When a Com. Carrier becomes liable to the bailor & dies his Exr. will still be liable; in this he differs from the Exr. of a Sheriff who is not liable for an escape suffered by his testator – The books say that the diversity arises from this, that the liability of the Sheriff is founded in tort, in such case, & that of the Carrier in Contract – In case of a naked bailment to keep, if another than the bailor claim the goods, the bailee

1. Aol. 607 [illegible] ought, as a genl. rule to deliver the goods to the bailor in preference to such claimant – But yet if the bailee knew that the propy belonged to such claimant, as if he knew that the bailor had stolen it, he would not be excusable in restoring it to the theif – And again if the bailee was not sure to which the goods belonged but risked delivering them to the claimant, & they should prove to be his, the bailee would probably be justified tho' they had not been stolen – But on the other hand in such doubtful case the bailee would be justified in delivering them to the bailor

Supplement — Of Bailment —

In the Case of a Com. bailee, i.e. who borrows, or hires, or does any thing for hire, not being a Com. Carrier; for merely exceeding the limits of the bailment, Case is the proper action. But if the design of the bailment be entirely counteracted, as if a horse be let to ride, & the bailee puts him into his team to plow & spoils him, the proper action is trespass vi et armis; & probably this last action would lie, for a mere excess of the bailment, as where one hires a horse to ride to Hartford, & rides him to Boston, if it were proveable that the bailor used fraud in getting the horse for that purpose — But where there was a mere exceeding of the bailment without fraud, tho' the law holds the bailee to be liable at all events, yet Case is the only remedy — The naked bailee can not assign, & if he do, the assignee gains no property by the assignment — It is a litigated point whether the pawnee can assign the pawn before the day of redemption — Notwithstanding the day of redemption is past at Law, the pawnor can afterwards redeem in Equity, which will decree a restitution of the pawn, on paym.t of the debt &c. provided it has not been assigned, but if it has will only decree the pawnee to pay over to the pawnor the surplus which the pawn sold for over & above the amt. of the debt for which it was pledged; for by an assignment after the day of redemption is passed the propt.y of the pawn becomes absolute in the assignee. If a Cred.r of the pawnor will tender the pawnee the amt. of his debt, he may, if the pawnee refuse to deliver him the pawn, levy his Ex.n upon it — but for a debt against the pawnee, the pawn in his hands cannot be taken — In one Book it is laid down, that if the 1.st pawnee pawn the article to a 2.d person, the pawnor can not redeem without paying the debt for which it was pawned the 2.d time, as well as his own Debt,

Supplement — Of Bailment — Of Duress —

this goes upon the ground that the pawnor by put-ting the pawn into the 1st pawnee's hands gave him false appearance of prop.ty whereby the 2d pawnee was induced to trust him — this is a great sacrifice of Just-ice to considerations of policy — In a modern Case

1: H. Blac. 158. is a doctrine holden some what different from that of

2 Ray. 909 in the Case of Cogs & Barnard; it is that the naked bailee to

Of Bail.t generally. Edw. Mod. 52. 266. 75 — 1 Mod. 2 — 1 Lev. 96. 1st Vent. 239. 2d ib. 270. Salk. 143. 1 Stra. 690. 4th Burr. 2298 — 2d Wils. 281 — Stra. 45.

keep & him to carry or do, are in the same predicament neither of them being liable except for gross negligence — But yet it is admitted & holden, that when one under-takes to do a thing gratuitously, to the best of his skill when his situation or profession implies skill, an om-ission to exercise that skill ~~to the best~~ is imput-able to him as gross negligence — Note — the retention of a pawn after tender made is an indictable offence —

Of Duress —

Obligations entered into under duress are void both in law & equity — Duress per minas, is when one is constrained by threats ~~of~~ which put him in fear of death, or great bodily harm, such as am.t to a maim — or the fear that ones house would be burnt; but it does not from the Books appear, that, the mere threat of a common battery, or of ~~the~~ destruction of prop.ty unaccompanied with dan-ger to life, would amount to this species of duress — Duress of imprisonment is the unlawful restraint of ones person in prison, or else where; or the cruel treatment of one lawfully imprisoned, when that cruelty is inflicted by the act, or procurement of the person who extorts the obligation thereby — The duress of a 3d person will not be sufficient to avoid a security thereby obtained, unless he be a relation as near, as a brother — If a contract made

1st: Ves. 19. 1st: Atk. 11 —

under duress be confirmed, or renewed after the duress is removed, it will be binding, unless ~~that~~ the contractor do through ignorance of his right to avoid the contract, in which Chan. would relieve — Vide No. 2 — page 14 & 15 —

Chan. will interfere as well in case of personal as real Contracts when the application is to be relieved against the Contract: tho' as a gen.l rule it will not interfere to carry into effect a personal Contract - Chan. will often interfere to relieve against contracts which would be void at law; if the reason assigned & really be that the person to be benefited by such contract may lie by & not attempt to enforce it till the evidence of its illegality is removed or lost - It is another rule in Chan. that liable to some exceptions that where no action for damages will lie Chan. will not help the party, as in case of the Stat. of limitations, having run upon the demand - the Stat. of frauds &c - But Chan on the other hand will not always give decree a specific performance where damages would be given at Law, as in case of a voluntary bond. & the reason is in that case, that no more than nominal damages would be given at Law - When damages cannot be recovered by reason of some informality in the contract or security, as where two good witnesses are required to an instrument, & it is found that one of them is incompetent being a lunatic or the like. Chan. will carry it into execution if justice require it, such defect notwithstanding -

Chan. will in many cases carry into effect contracts between a man & woman which are merged by a subsequent marriage - Chan. will take cognizance of a contracts between husb. & wife for a seperation & seperate maintenance & decree a specific performance when proper - A settlement upon a wife after marriage is not good where any thing by way of consideration is stipulated on her part, for the law in such case presumes coertion - But when properly made such settlement will not be permitted to affect the claims of prior Creditors - Mistake, as well as fraud furnishes a good ground for the interposition of Chan - & where by mistake too much has been put into an Obligation Chan. is the proper forum to which to apply for a rectification, & parol proof will be in such case admitted to shew the mistake - When no objection is made on the part of the Deft. (and after answer he can make none) any cause may be decided in Chancery - vide No 2. from p. 10 to 18 inclusive -

Supplement – Of Legacies –

Mr Reve, in his second course laid it down as the rule that where the estate including the general legacies, was not sufficient to pay the Debts without breaking upon the specific legacies, that the specific legatees must abate in proportion, & if they would not agree among themselves that it was the Executors duty to turn all the specific legacies into money & so make an average among the Legatees; sed qu. whether the Exr. has not a right to take which of the Legacies he pleases to pay the Debts, in such case, if no preference is given by the will –

If a testator give a Child a legacy by his will, & afterwards advance that Child in his life time, to the amt. of such legacy, it is an ademption of such legacy, unless there be a subsequent republication of the will – & if such advancement be less than the amt. of such legacy it is an ademption pro tanto – Pre. C. 138 – When a testator vests his Exr. with the power of distributing his estate at his descretion, either among his relations or others, if the Exr. in the exercise of such descretion be manifestly capricious & unjust ~~[illegible]~~ Chan. will interfere & regulate such descretionary conduct –

Upon payt. of legacies, the Exr. has a right to exact a Bond of the Legatee to refund if necessary, to pay debts & other legacies of equal degree; but if he neglect to take such security the authorities say that he cannot compel such legatee to refund unless he be himself first compelled by suit to ~~pay~~ make up such deficiencies of the estate in his hands, to the unsatisfied Credr. or legatee, in which Case he will be entitled to an action compelling such satisfied legatee to refund – When legatees have to abate it makes no difference that the will mentions one to be paid first, for all must abate, unless the will particularly order one to be pd. in full tho' the others be to be abated – 3d Atk. 96 1st Vern. 34 –

Tho' it is a genl. rule that a condition annexed to a legacy in restraint of marriage is void, yet it is indulged in the case of a husb. giving a legacy to his wife – vide No. 2 p. 45 to 56 –

N.B. A legacy given in lieu of Dower never abates in common with others

Supplement — Of Estates testate & intestate —

For a mere failure in the Adm.r to pay debts the Administra-tion bond, according to Eng. practice is never considered as forfeited & the sureties liable — but in Con.t it has been the practice to sue the bond on failure of the Adm.r but the propriety, or strict legality of such proceeding may well be questioned —

When a person who died insolvent had put his property out of his hands for the purpose of evading Cred.rs it has been the practice in Con.t as well as in Eng. for the Cred.rs to sue such fraudulent vendee, as an Ex.r in his own wrong — for the Executor or Adm.r of the deceased standing in his place could not impeach the sale or grant — But the Sup.r Court in Con.t has lately decided that it is proper for the Ex.r or Adm.r to put such prop.y into the inventory, acting in this respect as agent, for the Cred.rs & not for those claiming a distributory share, for they have no right to such prop.y, they being in the place of the fraudulent vendor — But it is presumed that the Ex.r in such case is not compellable to inventory the prop.y & run the risk of being worsted in the suit, unless indemnified by the Cred.rs — Neither was it in that case determined that it was improper for the Creditors to take the old method of suing the vendee or grantee as Ex.r in ~~their~~ his own wrong — In any other case than the above, where the estate is insolvent the idea of admitting of the existence of such a character as an Ex.r in his own wrong in Con.t, impugnes the principle of average, which is the leading feature in our law; for when a recovery is had against one as Ex.r in his

own wrong, the entire debt is recovered & not an average portion — & yet it is a generally received opinion that such a character does exist, how it would be decided if the point was directly made is uncertain. A creditor who is made Ex.r or Adm.r, may retain against other Creditors of equal rank, not only for such debts as are due him personally, but also such as he holds against the estate in quality of trustee — And when he is the trustee for the wife of the testator or intestate to secure a sum which the husb. before marriage had become oblig.d to leave his Wife, upon his death, the case is the same for such engagements are ranked among debts — & even if the wife who is the cestui que trust should be Ex.x she may retain what her trustee had a right to demand out of the estate for her benefit — & it makes no difference whether

2. Blac. 965
3. Bac. 1380

such obligation be pleaded by way of retainer or given in evidence under the ~~gen~~ issue of plene administravit — But it will not do in making such provision for a Wife, so far to exceed the portion which he rec. with her, as to make it evident that it was his design in so doing to defraud his Creditors — for altho' marriage of itself is a sufficient consideration to support a contract with trustees for a competent support for the widow, yet it will not do to go beyond ~~that to the~~ prejudice of Creditors — But when the portion rec. with the Wife is the consideration of the contract, doubtless he may go to the full extent of that, whether any thing be left for Cred.rs or not — Kennet vs Cadot & ux

Comp.

vide No. 2. Page 38th onward —

Supplement — Of Donatio mortis causa & Bail —

A Donatio mortis causa is not good unless there be a manual tradition; or something equivalent to it: as the delivery of a key, which is considered as a sufficient delivery of the property which it secures — It has been decided that the bare delivery of the evidence of a Debt, as in Eng. a note, not negotiable, upon which an action there cannot be founded, but is only used as evidence upon Assᵗ, will not be such a delivery as will vest the donee with the property of the debt of which this is the evidence But the delivery of a specialty or a negotiable note or bill of exchange, upon which an action may be brought, will be a good delivery to transfer the Debt due thereby — vide No. 2 p 75

Of Bail —

In case of an appeal the bondsman below is not discharged by the bond for the appeal, but the appellee has a double remedy if he was the party to whom bonds were given, & as the case may be, he may take part out of one & part out of the other, tho' he can have but one satisfaction

It is said that where a writ of Error is prayed out & bond given, the bonds below are discharged because the bondsman ~~to~~ upon the writ of Error is liable for debt & cost, which the bondsman upon the appeal are not if the appellant prosecutes his appeal to effect — vide No. 3 page 29th —

Supplement of Evidence

To the gen.l rule of Interested persons being exclud among other exceptions is the case of an Agent or factor, who is a good witness to prove the paym.t of mo-ey by him in behalf of his principal: & yet he interested — for by proving the paym.t he exonerates himself from a liability to his principal for such money if not proved to be by him p.d over. — If the witness thinks he is interested when in fact he is not legally so — or if he is, or considers himself to be ~~interested~~ bound in honor to bear his part of the expence of the suit, he is inadmissible, if offered by the person to whom he considers himself holden. When a person by his own act becomes interested in the event of the suit after the party has become entitled to his testimony, as by betting upon the event of the suit, he is notwithstanding a witness. The Bail never can be a witness for his principal, & ordinarily is not bound to testify against him, because he is liable for his default, but yet in case the bail was a subscribing witness to a contract, obligation &c. in favor of the adverse party, he must give evidence with regard to it when called on — When a master is sued for the misconduct of his Serv.t, if the Serv.ts conduct was such as would render him liable over to the Master, he cannot be a witness for his master, unless releas-ed, but if not liable to the Master he can be

Vide No. 3. Chap 1st fo 29 —

Of Pleas & Pleadings — (gen. definn)

Pleadings are the mutual altercations between the Pltff & Deft. put into legal form & set down in writing — 3. Bl. 293. 4. Bac. 1 — 10th Co. 122 —

Formerly pleadings were oral; hence in old law French frequently called the parol — 3 Bl. 293 — In England from the time of Wm the Conqueror to the 36th of Ed. 3d in Norman French — thence to the 4th Geo. 3d pleadings were in Latin, & since that in English — 4 Bac. 1 — 3. Bl. 317. 322.

In strictness pleading is no more than the setting forth such facts, as in Law shew the justness of the Pltffs demand, or the defendants defence. 4 Bac. 1.

Substantial rules of pleading are founded in strong sense & the soundest & closest Logic (Burr. 319) Every good declaration & every good plea contains the elements of a good syllogism — 3. Bl. 396 — Ex. declaration in trespass for ~~an~~ entering on the Pltffs land; Against him who entered unlawfully on my land, I have a right to recover damages — The Deft. has unlawfully entered &c. Ergo I have a right &c —

The major proposition contains the legal principle on which the Pltff relies — the minor the facts to which the principle is to be applied in the particular case; the conclusion is an inference of law, from the application of ~~which~~ the principle to the facts — The Major proposition is denied by an issue in law, the Minor by an issue in fact i.e. gen. or special issue; & the Conclusion by alledging new matter as in the Case —

Then the Plea of a Release forms another Syllogism as thus; If he on whose land I have entered unlawfully, releases the trespass, his right ceases - The Pltff. has released the trespass, to me, complained of, ergo &c - Thus all pleading is a Syllogistical process.

The first stage of a suit is in Eng. the writ, which is a mandatory letter, directed to the Sheriff &c, issued to compel the appearance of the defts. (3d. Bl. 273. Cow. 454. 7 Co. Rep. 4 - 1st. Wils. 147, Cart. 233 - Stra. 156. 1781 1st. Vent. 28. 8 Mod. 343 2d Bur. 960) tho' in B.R. the action is not deemed to be commenced, 'till the bill filed, tho' this is after the return of the Latitat: for the bill in that Court is considered as ye Orig.l (Cowp. 454 & the other authorities supra also 1 Bac. 41. 610 & 677. Co. L. 11. 610, 48. 3d Bur. 1323. 2 Hawk. 275 - In Cont. the writ & declaration go out together; But the suit is not here considered to be commenced to all purposes, 'till service 1st. Root 486 - as for example the deft. it is said, is not obliged to tender the cost of the writ, if he makes a tender before service - but the cause of action must exist at the date of ye writ -

The first stage of pleadings (in the extensive sense of the word) is the declaration or Count, (4 Bac. 1. 6. Co. L. 17 a 3d. Bl. 293 - The Count is but an amplification, or exposition of the writ, adding time, place &c (5th. Com. 18. 4 Bac. 8 &c

Pleadings in the more limited sense of the word (i.e. those which succeed the count.) are composed of the allegations which the deft. makes by way of defence; & those which the Pltff makes to fortify his Count. 4 Bac. 6 -

The first stage of pleadings which follow the Count, is the Defts plea - (4 Bac. 1. 3. Bl. 301. 4 Bac. 6. - 3d Bl. 299 -

The pleas on the part of the deft. are of two kinds: I Dilatory - II to the action 3 Bl. 301 4 Bac. 6

Of Pleas & Pleadings (Genl. Defin^n)

I (Dilatory pleas are such, as tend to delay the suit by questioning the mode in which the remedy is sought, rather than the right of action, (3 Bl. 301) & are of three kinds - 1st. to the jurisdiction - 2^d to the disability of the Pltff, & 3dly in abatement (3^d Bl. 301 - Pleas of the 2^d sort, to wit, in disability of the Pltff are some times also (tho' improperly) called pleas in abat^t.

II. Pleas to the action are answers to the merits of the comp^t. - these deny ye cause of action (either in point of fact or law) "And the Cause of action may be denied either by denying the Pltffs allegations, or by confessing & avoiding them (3 Bl. 303. 305, 6 -

These pleas are of two kinds - 1st the gen^l issue & 2^d - special pleas in bar (3 Bl. 305. 4 Bac. 54 -

A demurrer is not in strictness a plea, but is an excuse for not pleading - (4 Bac. 129, 130) It may be taken to the declaration, or any other part of the pleadings, (4 Bac. 129. Co. L. 72 a. - 5 Mod. 132 -) tho' therefore, it is a mode of denying the Pltffs right of action, it cannot be classed with pleas to the action; because 1st it is not strictly a plea, & 2dly it may be taken as well to any other part of the pleadings, as to the declaration -

Rules applying to pleadings generally

In every plea two things are necessary - 1. that ye matter be suff^t. & 2. that it be expressed according to the forms of Law - (4. Bac. 2. Comp. 683. Hob. 164) ye omission of either of these requisites is a cause of demurrer -

It is a gen^l. rule that every plea should be direct, not argumentative, not by way of recital, (4 Bac. 2. 9 22. 7. Co. L. 303. Plow. 128. 7 Rep. 25, This rule is however some what qualified now) 4 Bac. 2. 3. Leon. 300 -

Of Pleas & Pleadings (Genl Defs)

Each party's plea is to be taken most strongly against himself; for he is presumed to make the best of his own case (4. Bac. 2. Co L. 303. Hob. 234. 5. Com. 32 -
Surplusage does not vitiate a plea, but repugnancy in a material point does (4 Bac 2. 94. 4th Co. 42. Co L. 303. Cro. J. 549. 377. Carth. 288. 9 - So too of indictments Leach 110 - (vid. post
Every thing should be pleaded according to its legal operation - as for Example, a Conveyance by one joint tenant to another, as a release not as a feofft - both being already seized of the whole - a grant by ten.t for life to a reversioner, as a ~~release~~ surrender (4 Bac. 100. Co L. 193 b. 200. b. 4th Bac. 265. 1st T. Rep 446 2 H Bl. 11. Doug. 642. Cowp. 597) -

That which appears on the record need not be averred - (4 Bac. 2. Co L. 303. Plow. 65. 81 Cro J. 362 - 9 Co. 54 - 11 Co. 25 a 7 Co. 46 -

What is admitted in the pleadings cannot be contradicted even by the verdict (4 Bac. 2. 2d Mod. 5 - Immaterial averments must often be proved or the party pleading will fail, as when they relate immediately to the point in question - Secus if impertinent or foreign averments Doug. 640 2 Bl. R. 1104. -

If the declaration, plea &c wants form, or omits the circumstance of time or place; it is regularly aided by the adverse party's pleading over, instead of demurring specially (secus, if there is a want of substance) as for example, if there be duplicity in the plea, omission of profert & the like - (4 Bac 2. 7th Co. 25. a. 8 Co 120. Co L. 303. 2d Vent. 222. 1 Lev. 109 Carth 66. Sal. 519. - If new matter be alledged in any stage of the pleadings, it must be concluded with a verification (3 Bl. 309. Doug. 58. Cowp 575. 2d Burr. 772 -
In every stage of the pleadings each party may meet the allegations of his adversary by denying them. by confessing & avoiding them. by new matter of his own, or by demurring to them - & this may be done by either party till an issue is [illegible]

If then the defft pleads in bar, Pltff may reply, by denying &c — The answer to the plea in bar is called the Replication — that to the replication, ye rejoinder, then the surrejoinder — rebutter & surrebutter (3 Bl. 310. 4. Bac. 6 —

The Replication should fortify the declaration, ye rejoinder the Plea in bar &c (4. Bac. 6. Co. L. 304. 3 Bl. 310. Plow. 7. b. Dy. 22. Ld Ray. 1446 Stra. 422. Bul. 17. 5 Com. 99. 2 H Bl. 283 — Post Departure —

Judgt is always rendered upon the whole record — Ex. declaration & Plea in bar both ill, judgt for defft. (4 Bac. 7. 131. Hob. 56 — 199 — 200 8 Co. 120. 133 b. — 9. Co. 110. Sal. 173 — vide post — demurrer Arrest judgt) —

Of the Declaration —

The declaration being the foundation of the suit, it must shew all that is essential to the Pltffs right of action: for the Pltff can not prove any material fact which is not alledged (4. Bac. 6. 13. Co. L. 17. a Plow. 84. Hob. 199 —

If then the declaration (tho' otherwise suffnt) discovers any fact which shows that at the commencemt of the suit the Pltff had no cause of action, he can not have judgt — "His writ shall abate", says the Rule — Ex. debt on bond dated of the orig'l before the day of paymt (4 Bac. 13. 44. Cro. E. 325. Moo. 578. Cro. J. 574 & in such case if there be judgt for Pltff it will be erroneous & not cured by verdict (Idem. & Cowp. 452. 3d Bl. 273. 7. T. Rep. 4. Doug. 61 —

= The omission then of any thing which is the gist of the action is an incurable defect — The gist of the action is that without which there is no cause of action — That without which the Pltff cannot have judgt (4 Bac. 8. 5. Mod. 305) If there is such an omission the defft may demur — or if he pleads to issue, & the verdict is for the Pltff, he may arrest the judgt for there was no cause of action (4 Bac. 8. Doug. 658. 3d Bl. 395 4. T. Rep. 472. 2 H. Bl. 201 —

= The declaration must contain ~~certain~~ certainty i.e. the avert must be certain — that the defft may know what & how to answer, &

Of Pleas & Pleadings (Decla.n)

a regular issue may be joined & found, & that the Court may know how to give judg.t – There must be certainty as to time, place, parties & subject matters (5. Com. 27. 32. 4th Bac. 8. Co. L. 303 a. Show. 84. 122. Cro. E. 78. 97. 5. Co. 35. 1. Vent 272. Cow. 635

= Advantage cannot be taken (regularly) of mistakes in the declaration, by plea in abatement – the Deft. in such case should demur (4 Bac. 8. Sal. 212 220. 1. Bac 15. 1. Show. 91.) There is an exception however in case of misnomer in the Declaration & also in case of variance between the writ & ~~count~~ declaration vide post. plea in abate.t –

A contract not good at Com. law without being in writing, must be declared upon as being written – So also a Cont.t unknown at Com Law, & required by Stat. to be in writing – but otherwise it is of Contracts

= which at Com. Law were good without writing, but by Stat. are required to be written (6 Co. 38. 12 Mod. 540. Bac 279)

A Declaration may be Gen.l or special – Ex. Gen.l indeb. assu.t not stating the special facts & e contra – Declaration on the penal part of a bond only, & contra – Eject. specially stating the grounds of title & contra (4 Bac. 8 – A Plff declaring on a Deed, is not bound to set forth any more of it than is necessary to entitle him to recover (Doug. 642 –

Of Joinder of Parties in one Declaration –

When two or more are interested jointly in a right, they may & ought to join in an action for its violation, whether the action sounds in Contract or tort – Ex. joint obligees, Joint tenants & tenants in Common must join in a suit 4 Bac. 9. 1st Com. 10. 5th Co. 18 b. 19 a. Co. L. 164. Dy. 370. 2. Leo. 12 5th 5. Rep. 651. (post. Pl. in abate.t) 1 Bac. 532. 3 Keb. 690 – –

= And in case of a Contract ~~of~~ the non joinder of one may be taken advantage of under the gen.l issue – or it is a good cause of Demurrer unless it appears on the record that the other could not be joined as in case of death (Bos & 67. 5 Co. 15. Stra. 820. – But in Case of tort such non joinder must be pleaded in abate.t (6 T. Rep. 766 – Sal. 4. 290. Stra. 1140 –

But where the right is in one only, another cannot join; for the Deft. is not liable to a stranger, & such misjoinder may be pleaded in abatement or may be taken advantage of under the gen.l issue (Cro. E. 643. 1 Com. 13. 1 Leo. 315 (& vide post Pl. in Abatet.) ——

If actionable words are spoken of two, they cannot join in one action, for there is no joint right violated – So if two are beaten together, they must sue in separate actions (4 Bac. 10. 511. Ow. 106. Cro. E. 512, Esp. 504. Bul. 5. 1 Com. 195. 4 Ed. 120

So if two persons utter & publish the same slanderous words of another, he cannot join them in one action as Defts, for it is not a joint act (4 Bac. 10. Pal. 313. Cro. J. 674. Bul. 5. 15. Esp. 504. Bul. 5 —

But otherwise it is if two join in committing a trespass – So if two join in a Malicious prosecution (4 Bac. 10 Latch 262. Bul. 5 – (Vide 3 Bl. 117 as to what is a tort –) But two cannot be sued for distinct torts – (4 Bac. 10. Stil. 153

In case of Contract – If two or more, make a joint contract, they must all be joined in the action – (3 Bac. 697. 2 Vent. 99. Sal. 393 –

If three bind themselves jointly & severally; all or one alone may be sued – two only cannot in the same action, for the contract must be treated as altogether joint, or altogether several (3 Bac. 698. Yel. 26. 1 Sid. 238. 3 Rep. 782 –

And if two or more bind themselves by one contract: it is joint of course, unless the terms of it imply a sev. or a it. other or duty (3 Bac. 697. 2 Atk. 31. Chit. 175 – 1 H. Bl. 236. 5 Bur. 2611 –

If two enter into a joint bond & one dies; his Ex.r is not liable at law to the Obligee – the only legal remedy in such case being against the only surviving Obligee – secus if the Obligation be joint & several (1 East 400 – 21 –

If A. delivers goods to B. to del.r to C. & B. does not del.r them A. or C. is

it is said, may sue: but they cannot join in one action (4 Bac. 9 - 10 - 1 Bulst. 68 - Hard. 321 - 1 Pow. Cont. 343. 353 Litt. 220 -

Of Joinder of Causes of action in one Decln.

Rule: Sevl. causes of action of the same nature may be joined (4 Bac. 11. Comb. 244. Kirb. 160 -

By the rule, it has been said, is meant, that if sevl. causes of action all requiring the same judgt. at Com. Law, they may be joined, i.e. a capiatur, or misericordia (4 Bac 11. 5 Bac. 191. 1 Bac 30. Doug. 652. 2 Wils 319. 1 Vent 366)

Ex. debt on bond, & on loan may be joined, altho' the plea = genl. issue be difft. (Cro. C. 20. 316. 1 Keb. 147. 1 Vent. 366. 1 T. Rep 276. 1 Wils 252

But this is not universally true (1 Wils. 252. 1 T. Rep. 276 -

But it is universally true, that if several causes of action all require the same judgt. & the same plea (i.e. the same genl. issue) they may be joined - Ex. debt on several bonds - Covt. broken on sevl. deeds - Asst. on several promises (1 Wils. 252. 1 T. Rep. 276) "Whether Ejectt. & asst. & battery might be joined has been questioned 4 Bac. 12. Hob. 247 -"

So sevl. trespasses vi et armis may be joined - sevl. trespasses on the case; as case vs bailee for negligence & trover &c. (8 Co. 7. 8. 1 Vent 223. Bl. Rep. 848. 1 Wils. 252, 2 Wils. 319) for the genl. issue & judgt. is the same - So of trover & slander, (Doug. 652) slander & case for malicious prosecution (Cowp. 230 -

So too in some cases there may be such joinder, where the judgt. only is the same, tho the Pleas are difft. - as per Ex. Debt & detinue - debt on bond & on loan - vide supra (4 Bac. 11 &c -

But trespass & Contract can not be joined for the judgts. & pleas are both different (Sal. 10. 1 Bac. 30 -) Nor trespass & case arising ex delicto, (as it seems) for the judgts. are difft. - Nor case arising ex delicto & Contract, for the Pleas are different (4 Bac 11. 1 Vent. 366. T. Ray. 233. 2 Wils. 319. 2 Bur. 1114. Plow. 1 Sid. 244. Carth. 189. 2 Ray 58. 5 Mod. 90. 3d. Lib. 322. Keb. 59 -) Nor debt & account, for tho' both are founded on Contt., the Pleadings & proceedings are different - (4 Bac. 11. 1 Bac. 21. 1 Mod. 42 -

Of Pleas & Pleadings — (Declar.)

The distinctions then appear to be these; When the judgt. & Pleadings are both the same, there may always be a joinder; & in most cases where the Pleas are different, if the Judgt. are the same — On the other hand; where the Judgts alone are different — & a fortiori where the Judgts & Pleas are both diffs.; a joinder is never allowed.

The joinder of several causes of action which cannot be joined according to the foregoing distinctions is a good ground for demurring or arresting Judgt. (4 Bac. 11. Sal. 10. Carth. 436. 3 Lev. 99. — N.B. this fault is distinct from duplicity. vid post —

How far does the Principle apply in Connecti.t? (5 Bac. 191.3 —

But it seems that a declaration in trespass charging defd. with breaking Pltffs house, destroying his goods, & beating his servts, per quod servitium amisit, is good ~~upon~~ the beating being only aggravation, & the damages consequential — & indeed the action for that alone would in form be trespass in Eng. (4 Bac. 12. All. 9. Carth 113. Stra. 43. 202. 2 Wils 313. 3d Ibid. 20. 3 T. Rep. 292. 1 H. Bl. 555. 2d T. Rep. 167 —

Where sevl. actions are brought for several things of the same nature, the Court may compel a joinder or consolidation of them in one declaration — Ex. sevl. actions on notes &c (4 Bac. 11. Comb. 244. 1st Com. 111. 2 T. Rep. 639, but it is discretionary (Stra. 1149. 1178.

The declaration should agree with the writ — Thus if the writ entitle the action trespass, a declaration in case will be a fatal variance (4 Bac. 12. 13. Dr & Stud. Cro. C. 325. Hob. 180 —

When the Pltffs right of action is to accrue on the performance of a condition precedent, he must aver performance in the declaration — the omission of which is an incurable defect. 4 Bac. 16. 7 Do. 10. a 1 T. Rep. 645. 5 Com. 45. 1 Saund. 319. 320. 2 H. Bl. 574 — 7 T. Rep. 125 —

But where the Pl^ffs right is qualified by a cond^n subsequent, he is not bound to take notice of ye cond^n: it is matter of defence, & for the def^t to plead (4 Bac. 16. 7. 9. 10. 1 P. Rep 638. Esp 300. 1 H. Bl. 254. 2 do. 574. 7 Rep. 65 —

So if there are reciprocal (i.e. independent) cont^ts or promises, ye Pl^ff need not aver nor prove performance of his part — secus if the cont^ts are dependent (4 Bac. 16. 6 co. 9. 645. 2 Mod. 309. 5 do. 10. — Ex. Prom^s by def^t in consid^n of Pl^ffs having promised is Reciprocal — 2 In consid^n of Pl^ffs performing &c — dependent —

Those facts which constitute the gist or substance of the action, must be expressly & positively alledged — not by way of recital — Ex. "Whereas the def^t assumed &c" — not good — nor would such defective statement be aided by a verdict (4 Bac 2. 22. 97 — 5 Com 45 — 6 Co L. 303. 2 Lev. 206 6 co. 9. 361. Sal. 636 —) — But the rule does not hold, I conceive, as to such facts as are not traverseable by plea; however essential they are — Ex. Consid^n in ass^t; — possession in trespass, science in certain cases (4 Bac. 13. 14. 22. 3 — 10th Co 77. Hob. 5. 18. 6 co. 6. 116. 1 Com. 208. 4 Co. 18 a Nor does it hold as to matters of mere inducement — for these are not traverseable; nor indeed are they of the substance of the action (4 Bac. 13. 14. Pop. 177. Yel. 70 —

The thing sued for must be described, with certainty but no greater certainty is required than the nature of the thing will admit of — & it is said to be suff^t if from the description the Jury can know what is meant — Ex. Trover for a Ship & Sails suff^tly certain (4 Bac 24. 5 Id. 272 — 3. 5 Co 34. Cro. E. 817. 1 Vent 53. Sal. 628. Stra 637 L Ray 588. 1410 — The object of the rule is to enable the def^t to discover for what particular thing he is sued & to plead one recovery in bar to a second action for the same thing 5 Bac. 272. 5 Co. 34 —

Of Pleas & Pleadings (Declar.)

A "library of Books" has been holden a suff. descrip.n (5 Bac. 272. Ab. 25 - qu.) - "Some fish" not suff. - So "pieces of linen" - So two sheaves of Corn - (5 Bac. 272. 5 Co. 34. 2 Show. 433. 3 vol. 866 -

If the declaration is good in part, & ill in part, the Pff may recover upon the part which is good, if the action is not for an entire thing demand - Ex. Action on two bonds, one shown not to be due - if the deft demurs the Pff shall have judg.t for the amount of the one which is due (4 Bac 25-6. Hob. 178. Rol 784-5. 10th Co. 115. Yd. 45. 2 Show. 103. T. Ray. 395 -

But tho' the demands are distinct, yet if a verdict is found for the Pff. with entire damages, judg.t must be arrested (Ex. in case of Slander) 2 Bac. 7. 4th M. 512. 1 T. Rep 508. 532) unless the amount of each demand appears on the Record, as in the case of two bonds - ut supra. (Hob. 178.) -

When the demand is entire, if the declaration is ill in a material part, it is so in toto - I conceive: For all the parts except mere surplusage (which can not vitiate) are necessary to constitute one cause of action -

If the Jury assess greater damages than the Pff demands, he may release the surplus, & take judg.t for the rest (4 Bac. 25. F. N. B. 107. Mo. 28. 2 Bulst. 230. Sh. 364. Hard. 53 - Or the Court to prevent error, may without a release give judg.t for the residue only 4 Bac. 25 -

So if the Pff demands more than by his own shewing is due, & the jury find more; he may remit the excess, & take judg.t for the residue (4 Bac 26. 1 Rol. 785. Stra 175 vide 4 Bac 195. 272. Esp. 304. 2 T. Rep 113 - Notes 20 (N. Trials No 40. 2.

For exceptions to this Rule see 4 Bac. 26. 7 Mod. 87. Sal. 658. 2 Ray. 814 -

Of the Pleadings which follow ye Declaration

I. Dilatory Pleas — These are called dilatory because formerly they were used without any foundation in truth, & merely for delay (3 Bl. 303 —) But now by the stat. of 4 & 5th of Ann. no dilatory plea is allowed without affidavit of its truth, or of some matter to induce the Court to believe it true (4 Bac 35 - 51 - 3 Bl 302 1 Com. 2. - 3 Wils. 51 — In Cont. there is no such Stat. —

= I. To the Jurisdiction of the Court — Causes of pleas to the jurisdiction are various — Ex. Some privilege of the Deft.; as that he is Atty in another Court in Eng. — that the cause of action (the jurisdiction of the Court being limited) arose out of the jurisdiction &c (1 Com. 3. Lutw. 11. 354. 3 Bl. 301. 2 Bulst. 207. Sal. 544. 4 Bac 36.) (N.B. The privileges of Attys extends only in actions brought against them in their own right not to those in auter droit — as Exrs &c nor when ye Atty is a codeft. with one not privileged — nor where the action is not cognizable in his own Court (1 Bac 36-7. Gro. 6. 581. Stra. 2. Hob. 177.)

= When the Court has no jurisdiction of the subject matter that may be pleaded, yet it is not necessary so to do, for the proceedings are coram non judice & void (4 Bac. 35. 1 East. 352. 1 Wils. 333. 10 Co. 68. &c —

That the cause of action arose in a foreign County is no objection in transitory actions — Secus in local: Ex. where the ~~jurisdiction is taken in~~ Indict. is to be in Cumb. So in crim. Cases (Hob. 161. 175. 181. 2 H. Bl. 145. 6. 161. 2 (Kirb. 25)

This is regularly the first Plea in the order of Pleadings, for the exception, when necessary to be taken by plea, is waived by any other plea (4 Bac. 98. 35. 1 Com. 5 — Co. L. 127 b. 4 Bac. 7. Hob. 164 —

This plea (to y^e jurisdict^n.) is signed in Eng. by the party. For an Att^y. or an Off^r. of the Court & a Plea signed by him is supposed to be by leave of the Court & asking leave acknowledges the jurisdiction (4 Bac 35-6. 6 Mod. 146. Barns 190
= But the exception cannot be thus waived when the suit is corum non judice ("False imprison^t") —
[In Connecticut such plea is signed by Att^y.]
It concludes to the cognizance of the Court by praying judg^t. whether the Court will have further cognizance of the suit (not like a plea in abat^t.) 3 Bl. 303. 4 Bac 35. 6 Mod. 145-6 — Cr. Ch. 363. Sel. 298) —
= In Connecticut when actions are dismissed on a plea to the jurisdiction, costs are allowed to the Deft. (S. Court contra Mar. 1802) secus, if dismissed by the Court ex officio without plea —
[Allowance of cost is intended to prevent a suit by y^e Deft. Qu. how can this be? The cost taxed cannot be ye rule of damages & the deft. has a right to have his damages assessed by jury]
For the liability of a Pl^ff. who sues in a Court not having jurisdiction, see "False imp^t. Malic^s. prosecu^n")
II. To the disability of the Pl^ff. — The causes of this plea are numerous —
First Outlawry of the Pl^ff. till reversed or a pardon obtained — For he is out of the protection of the Law — (1 Bac. 2. 4th. 96.35. 1 Com. 4. 3^d Bac. 761-2 — Litt. ff 197 Co. L. 128 —. Outlawry does not strictly abate the suit, it is a temporary impediment which continues only 'till reversal or pardon for then Deft. must plead to ye same writ 4 Bac 35

But this disability extends to such suits only as are brought in the Pltffs own right; not to them which he brings in auter droit — for Ex. as Exr. or Admr. Co. L. 128.a 3 Bac 762 — ∴ But outlawry of the testator &c may be pleaded in an action by Exr. &c for in this case the disability goes to the person whose right ^is to be enforced by the action (Com. 6 Lutw 1622)

An outlaw may be sued like any other person — it being to his prejudice — The disability is intended to deprive him of a civil right, not to furnish him with an immunity. 3d Bac 761. Noy 1- 1 Sid. 60 —

Outlawry is always pleadable (if at all) as a dilatory plea — & yet some times it is pleadable in bar — The Rule is — When the cause of action is forfeited (as if the outlaw is a felon) it is pleadable in bar of all actions concerning his goods or chattels, lands, or tenements — they being forfeited (1 Bac. 14. 3d Ib. 761. 5 Co. 109 — 7 Ib. 29. Co. L. 29. 128.b) or it may be pleaded as a dilatory plea in such cases —

But when the cause of action is not forfeited it can be pleaded only as a dilatory plea as where the damages are merely presumptive — Ex. In asslt. & batty — slander &c — Here the right is not forfeitable even by felony — So where the action concerns his goods or lands, if they are not forfeited. 3 Bac 761. 2 Bay. 227. Co. L. 128.b —

Secondly — Excommunication — This in Eng. disables a Pltff to sue either in his own right, or even as Exr. or Admr. — for he cannot dispose of the goods of yd decd. in pios usus (1 Bac 3. 1st Ib. 2o — 2 Ib. 319. Co. L. 133-4. 1st Co 63. 1 Rol 28

This does not abate the suit, but the deft. is discharg'd from answering sine die, but liable to be summon'd again, or attach'd again, on the Pltff's absolution—Absolution being the only good answer to this plea (4 Bac 36. 2 Ib. 320—8 Ib. 96—Co. L. 133—4—

Thirdly— Alienage is, in some cases a disability in the Pltff— An alien (even tho' an alien friend) if not naturalized nor made a denizen can maintain no action real or mixed— Secus of Personal actions (Comp 171. 3 Bl 384. Kib. 413. 1 Bac. 4. 824. 4th Ib. 36. 1 Com 7. 24 Ib. 162 1 Bl Com. 371—2.) for he can not hold lands (1 Bl 371. Stat. of Conn. 237— 2 R. 339. Stra. 1082—

It is a general Rule that an alien enemy, as a prisoner of war ex. gra. can maintain no action Stra. 1082. 4 Bac 96. 1 Ib. 83—4. 1 Bos. & 163. Co L 129— 6 T. Rep 23. 49. Doug. 626 or 649—

But an alien enemy may maintain an action on a ransom bill tho' he that was the hostage is attainted taken— by the law of nations Doug. 619. 2 d Bur. 734—

So an alien enemy residing here under a licence, or protection, or who came under safe conduct from the Govt. may maintain personal actions 2 Ray. 282, Sal 46. 1 Bac 4, 84— 8 T Rep. 166. Stra 1082. Fort 221—

Query whether an alien enemy not thus protected can sue as Exr. &c (1 Bac. 84. Cro E. 142. 683—

An alien friend may as Exr. &c hold leases (but not in his own right) of course he may sue for them (Co. L. 2 or 8. 1 Bac 84—

Fourthly— Spiritual recusancy— Premunire. attaind. of treason or felony—& having entered into religion are disabilities in Eng. (3 Bl. 301. 4th Bac. 36. 148. 4 Bl 380. 1 Com. 7—

Fifthly - Coverture of the Pl^ff is pleadable in abat^t as a disability - i.e. when a feme cov^t sues without her husb. - secus if he joins in the action (4 Bac. 39. Co L. 132. 1 Bl. 443. 1 Com. 9. 3^d T Rep 631 - & this exception must be taken in abat^t, & can not in a plea to the action (4 Bac. 24. Carth 124. 3 T Rep. 631 - = And generally speaking, whatever might be taken advantage of by a dilatory plea, shall not be pleaded in any subsequent stage of the pleadings. (6 T Rep. 766.) there, however, are some exceptions to this rule - "Baron & Feme" -

If a feme Pl^ff marries, pendente lite, her coverture may be pleaded in abat^t - i.e. in disability. (4 Bac 39. 1 Bl. 34

Sixthly - That the Pl^ff is an Infant, if he sues without guardian or proch. amy) is pleadable to his disability (3 Bac 148-9 - 3 Bl. 301. Sal. 296. 1 Ld. 287-8. Co L 135. Carth. 123 -

Pleas to the disability of y^e Pl^ff conclude to the person by praying judg^t if the s^d A. B. the Pl^ff ought to be answered (3 Bl. 303 -

III. Of Pleas in Abatement -

= abat^t denotes prostration as "in case of nuisance (5 Bac 25 Co L 134^b - Pleas in Abat^t gen^ly extend to the writ only - defects in the Count are reached by pleas of a diff^t kind (3 Bl. 301-3 - 1 Bac 15. Sal. 298. Carth. 172. 3 Lev. 351. 354 -

In Connect. the writ consists of that part of the Record which precedes the stat^t of the cause of action - This stat^t itself constitutes the declaration - the date is common to both - the signing, recog^ce & certificate of duty are part of y^e writ. 2 Swift 186. 1 R. (?)

It is not universally true that the Plea in abat^t can reach the writ only - & not the Count -

Of Pleas & Pleadings – (Abat.)

= A plea which goes to the writ is a plea in abatt. but it is not universally true that a plea in abatt cannot go to the Count. In some cases it does, as for Ex. Misnomer in the Declaration – So in Connect. a variance between an instrument, & the description of it in the Declaration – (vid. post) 3d Bac. 624. 3 Bl. 301 – 3. 1 Com 96 – 4 9. 287. 4 Bac. 8. 50. 5 Mod. 132. 144 –

In pleas in abatement great precision is required for they are not favored at all, but the smallest inaccuracy will be fatal (3 T. Rep. 185–6 – 5th Bl. 487 –

Causes of abatet. are –

1st. Misnomer & want of addition – A misnomer of the Deft. is a ground of abatt. whether the mistake be in the writ or Declaration (3 Bac. 624 – 4th Bl. 38. Salk. 3 Bl. 302. 1 Sid. 247. – So in Eng. is the omission of the Defts addition – the addition is the parties title, trade, estate or degree & his place of abode – These by Stat. 1 H. 5 must in Eng. be added to the Defts name by way of description, for the sake of certainty (3 Bac. 617. 3 Bl. 302 Carth. 14. – 6 Mod. 105. (co E. 371.) & the omission is pleadable in abatet. – = But this Stat. relates only to personal actions, appeals & indictments – not to real actions – In these constat persona from the possn. (3 Bac. 618. 6 Mod. 85 – So a mistake in the addition is cause of abatet. (3 Bl 302. 1 Com 28. Comb 65. 1414 S. Ray.

In Connect. the only necessy. addition in ordinary cases is the place of abode – but when one is sued in his offe or other civil capacity, i.e. when his civil character is the inducement to the action, the addition is necessary here as in Eng. – Ex. heir, Exr. Admr. Sheriff &c ~~ sued as such (3 Bac. 619. 620–1. 4th Bl. 39. 2d Vent. 82. – Carth 301–2 –

But if the addition by way of inducement (ut supra) is unnecessary it is mere surplusage, & a mistake does not vitiate — Ex. a suit for a trespass committed by him-self, is wrongly described as the heir of J.S. (3 Bac. 621. Cro. E. 333.

= "Misnomer, (or want of addition) of one of two defts. is not pleadable by the other — nor can the latter in genl. take any advantage of it, (not variance) for the former may if he pleases admit himself to be the person named in the writ — (3 Bac. 626. Lutw. 36. 4 Bac. 38 — & the same rule holds in indictments, or other crim. procs. agst. several, (3 Bac. 626. 2 Hale 177 — ;

Quere. If the writ abates as to one of sevl. defts. for misno-mer; does it abate in toto? — it seems not — (Quere if the cause of action is joint & not several) (Carth. 96. Com. 79. 8 Co. 159. 3 Bac. 625. 4 Bac. 45 — L[d] Raym. [illegible] — But in Esp. N.P. Rep. vol 3d 76, action on joint Contract, if Pltff. enter a nolle pros. as to one deft. he cannot proceed agst. the other — 5 Mod. 47 — (before the Stat. of A. 5)

The degree or dignity of a deft. (if as high as that of a knight) must have been added, but not otherwise) 3 Bac. 617. 2 Rol. Abr. [illegible] — Com. 189) — & there is the same rule as to Plffs (3 Bac. 617. 1 Com. 15 —

A Deft. who pleads a misnomer, want of addition, or a mistake in the addition, must give the Pltff a better writ, i.e. must set forth his right name &c. otherwise his plea is ill (Fin. 324. Law 363, 3 Bac. 624. 8 T. Rep. 515 — & in his plea he must state that he was known & called by such name at the time of the writ's issuing (3 Bac. 624. 4 Skin 629. Sal. 6-7. 4 Mod. 347. L. Ray 118. 249. Bac. 38 —

Misnomer &c is (as such) to be taken advantage of only by plea in abatt. — & is waived by pleading to the action — For the Deft. cannot assign for error (as a genl. rule) what he might have pleaded in abatt. (4 Bac. 38. 1 Rol. 780. Carth. 124. Sal. 2 — 3 Bac. 623-4 — Comb. 188. 6 T. Rep. 766 — & vide Post.

If one executes a specialty by a wrong name he must be sued (it is said) by the wrong name, & the Execution must pursue it — But the true name may come in under an alias, (Stra 1218, 3 Bac. 617. Dy. 173. 1 Bulst. 216) Quere — May he not sue by his right name with an avert. that he executed the writing by a diff. & wrong name? 3 Bac. 616 —

A mistake in deft. christian name said to be fatal! 3 Bac 616 622, Co L 3. 5 Co 43. Dy. 279. — Qu. Stra 1218 —
= The writ should always describe all the defts. by proper names — merely giving the firm of a copartnership as A. B. &c seems not suffi. (8 T Rep 508. vide Leach Crown Law 240. — Seems of Corporations — They must sue & be sued in their Corporate names — the Names of the individual Corporators not being a suffi. description Leach 244 —
= "A deft. need not for his own security, take advantage of of any mistake in his name or addn. — for if afterwd. sued by his right name, for the same cause, he may plead the judgt. in the former suit in bar, with an averment that he is the same person &c (4 Bac 38. 3 Bl. 625. Stra 1218
= Misnomer of the Pltff may also be pleaded in abatet. (1 Com 14 &c) But a wrong addition can not, except as at com Law; for there is no danger of a mistake in that case — (at any rate the Stat. of H. 5 does not extend to Pltffs. (1 Com 5. 3 Bac 617. 618. 6 Mod. 85, 1 Show. 392, 2 Rol 469) — Que. in Cont. if Pltffs place of abode is mistaken? —
At com. law misnomer was not pleadable in abatt. to an Indictt. for felony — for the Prisoner being present constat de persona. Seems now by Stat. H. 5 — (4 Bac 38. Cro C 104 1 Sid. 40. 2 Haw. 186) But it answers no purpose — for he is not discharged, but indicted again while in custody (2 Haw. 367 1 Hale 248. Stra 176. 298 —
2o. Coverture of Deft. is a good cause of abate. (4 Bac 39 Co L 132, 1 Sid 140. 5 Com 193.) (Reasons expd. in Husb. & Wife — R. L. 28) aliter if a feme sole deft. marries pendente lite, for her own act shall not defeat a suit rightly commenced agt. her (1 Bac 9. 10. 4 Id. 40. Cro J 323, Esp. 328. Stra. 814. L Ray. 1525 —
If a feme Covert deft. would avail herself of her coverture at all, she must plead it in abatet. as it seems, for otherwise she admits herself to be rightly sued, as by praying an imparlance &c (4 Bac 29. 39. Latch 22. Lutw 23. 1178. Quae (4 Bac. 39 —

But if the Feme does not so plead it, her husb. may appear & plead it in bar in any stage of the proceeding or reverse the judgt. against her by writ of error coram vobis (4 Bac. 9. 10. 39. 2 Rol A. 53. Stil 254. 3 T. Rep 631. 5 D. 681. Sal 400 - A. L. 217 -

That the deft. is an Infant & sued without guardian is not a cause of abatet. - But the Court will allow him to summon his guardian if he has one; & if not will appoint one ad litem (Co. L 89. 135. L. R. 39. 3 Bac. 149. 150. 5 Co. 53 3d Bl 427. -

So in Connect. ~~that the~~ cutts conservator has not been cited is no cause of abatet.; but reasonable & suff. time will be allowed to cite him (Kirb. 174 -

3. Death of Parties -

At com. Law if a sole plf. or sole deft. died pendente lite the suit abated (Co L 139. 4 Bac 40-1. 1 Com 55. 56. Dou. 982. 10 Co 134. 1 Bac. 7. -

So if one of sevl. Plffs died, excep in persl. actions after summons & severance, the writ abated - & there was no exception in case of real actions (1 Bac 7-8. 10 Co 134. 6 Co 26) because by the death of ~~a~~ one of sevl. joint Plffs in a real action, the extent of the survivor's right is increased (1 Bac 7. 8.) but in the writ he goes for his orig.l part only -

At com. law if one of several plffs died after verdict & before judgt. the rule was the same - & judgt. was arrested except as in the last case (Ray. 468 -

But if one of sevl. defts died the rule was genl. even at com. law, that the suit should not abate - In such case the plf should make an entry of his death, & proceed against the survivors (4 Bac 42. 1 Sh. 8. 3 Mod 249. Hard. 151. Sho. 366

In this case, however, if he should take judgt. vs. all the orig.l defts; it would be erroneous in toto (Carth. 12. 9. 1 Com 56-7 -

But now by Stat. of 17 Car. 2d. & 8th. 9th. W. 3. - & by a Stat. of Connt. the inconvenience of abatet. by death of parties, is in a great measure remedied - So that when there are sevl. Plffs & one or more dies, pendente lite, the suit does not abate

Of Pleas & Pleadings (Abatet.)

if the cause of action is such as would survive to the survivor — So when of sevl. defts one or more dies - if the cause of action is such as would survive agt. the survivor, In either case the death being suggested on the record - the suit proceeds (1 Com. 54-5. 4 Bac 42. 2 Mod. 115. Stat. of Cont. 22-3

= And if a sole Pltff or deft. dies pende. lite, in a case in which the right of action would survive to the Exr. or Admr. of the Pltff in the one case, or agt. the Exr. &c of deft. in the other = the suit in Cont. does not abate - So in Eng. if the death happens after an interlocutory judgt. (Stat. of Cont. 22-3. 4 Bac 42-4

If in the last case the Pltff dies; his Exr. &c may enter & prosecute the Pltffs death being suggested on the record - If the Deft dies, the Pltff or his Exrs &c may have a sci. fa. agt. ye Exr. &c to shew cause why judgt. should not be rend. agt. him (Stat. of Cont. 22-3, 4 Bac 42, 1 Com. 54-5 - Our Stat. however relates only to actions in the Supr. or County Court in all of [illegible] cases -

Suppose two Pltffs both of whom die at difft. times pend. lite the action I suppose survives first to the survivor & then to his Exr. &c — If there be two defts. both of whom die ut supra, the action I suppose, survives first ~~to the~~ agt. the survivor, & then agt. his Exr. &c —

Real actions still abate in most cases on ye death of a sole Pltff or deft. - for ye Stats which keep alive actions in favr. of & agt. Exrs &c do not affect real rights - But real actions brought by sevl. Pltffs or agt. sevl. defts are within the Stat. on ye subject (1 Bac 7-9. Cro E. 892. Co L. 139. Stat. of Cont. 22-3 —

It was decided by our Supr. Ct. 1800 that Petns for N. trials are within our Stat. on this subject, tho the Stat. was passed before such petitions were known - & yet on Respondents death sci. fa. lies agt. his Exr. as in actions (Griswold vs Mixer Supr. Ct. Hartfd. Feb. Ter. 1800 - & Judgt. affd. in Supm. Ct. of Errors June 1803 -

4th. Variance is a good cause of abatet. (4 Bac. 40. 4 -

If the declan. varies from the writ, the variance may be plead in abatet. - & the the declan. itself is said to abate the writ (4 Bac. 8. 43-4. 1 H Bl. 249. 1 Com. 37. Salk. 5 -

If the variance is in point of form only a plea in abatet.

= is necessary (Gil. 120. Latch 173. Finch 357); but if in substance a plea in abatt. tho' proper, is unnecessary it is said, & judgt. may be arrested, ~~or the suit dismissed~~ or the suit dismissed by the Court ex officio – Ex. Plff in his writ demands £20 – & shews in his declaration that only £10 is due (1 Hob. 279. 4 Bac 43–4. 6 co. E. 722. 121. 185. 198 Bos & P. 19. 26. Hob. 88. 199 – Quere whether the last rule is agreeable to the modern practice in Eng.? (2 Wils 394 Sal 6 & 8. 6 Mod 36.)

Variance between the instrument sued on & the description of it in the writ is a cause of abatt. (1 Com. 44.

If the variance is between the Instrument on which &c. & the description of it in the Declaration, the usual mode in Eng. is to take advantage of it in evidence under the genl. issue – It works a nonsuit (1 T. Rep. 656. Plow. 84. Doug. 640. Bos. & P. 7. 3 Bac. 698. 1 Root 119. 4 T. Rep. 612 –

= In Cont. advantage of such a variance is usually taken by plea in abatt. – & so I conclude, it may be done in Eng. (1 Com. 44 –) Advantage may however be taken of such last mentioned varice. in several ways as 1 by Plea in abatt. – 2o. in evidce. undr. the Genl. issue, 3 by objecting to its admission as evidce. – & 4. by demurring to it as evidence, Kirb. 106 – = It has however been decid. in Cont. that demurrer (on oyer) to the decln. for such variance is not good (Kirb. 106–7 – Qu. Is not ye. Eng. practice contrary (Hob. 18. 2d Wils. 339. Stra. 1146. 2 Leon 42. Doug. 208. 213. Bul. 313.) –

– Misnosmer – if it works a variance may be taken advantage of under ye genl. issue – Ex. A. having executed a bond is sued upon it by the name of B.; but in this case advantage is taken of the mistake as a variance, not as a misnosmer (4 T. Rep. 612. L. Ld. 656). (The bond in evidence in this case does not support the declaration) For regularly matter in abatt. must be taken advantage of by plead[?]g in abate. (6 T. Rep. 766. 2 Bac. 157. 2 H Bl. 267. 293 –

5 – Non joinder & Misjoinder, of parties is a cause of abatement. The Genl. rule is, that if one sues alone, when sevl. ought to join, the nonjoinder is always pleadable in abatement.
 ex. Thus if two joint tenants & in some cases one of two tents. in common – or one of two obligees or promissees sues alone it may be pleaded in abatement (Com. 10.11 – Co. L. 164.a 189.a 195.b 198.a Lil. 4 – 7 T. Rep. 243 –

So if several sue when the right of action is in one only it is pleadable in abatement (1 Com. 13. Cro. E. 143. 1 Lev. 315. Hob. 72. Hid. 24

And if in contract one sues alone when others ought to join or two or more sue when the right of action is in one only, advantage may be taken of it the mistake, under the Genl. issue (1 Bos. & Pul. 75. 2 T. Rep. 282, Bul. 152,) In either case the contract proved is not the one declared on & stated in the declaration –

In actions founded on tort, the mistake must be pleaded in abatement if one sues alone (Sal. 290. 4. Stra. 820. 1146 Cro. E. 143. Esp. 123. 5 D. 18 b) – If one of sevl. wrong doers is sued alone no advantage can be taken of it unless Secus if two sue in tort where the right is in one (Lucy de ... Sup. Ct. Fairfd. Jany. 1803, advantage taken on genl. issue)

If in an action on Contract one sues alone where an other ought to be joined, & this appears in the declaration the mistake is fatal, & not aided by verdict (5 Co. 18.b Esp. 302 Stra. 1146) Secus in tort 6 T. Rep. 766 – If one part owner of a Chattel sues alone for a tort & there be no plea in abatement on that ground, when the other part owner brings his suit it can not be pleaded in abatement that all the other owners are not joined, for then the Pltff would have no remedy, & that thro' the fault of the defendt. in not pleading in abatement to the action of the first (7 T. Rep. 279 –

If one of two partners or obligors is sued alone on Contract the non joinder of the other, must be pleaded in abatement.

or it is waived, unless it appears on the face of the declaration that there is another partner or obligor living (5 Bur 2611. 2 Bl Rep. 947. 950. 5 T. Rep 651 Kib. 77. 1 H Bl. 236. 6 Co f. 15 2. 5 Co. 119. 9 Co. 110 Sal. 440 contra) (In torts one or all, or any member may be sued joint & sev.) He can not rely upon the gen. issue for it his deed &c, tho' not his sole deed &c, & so it is not ~~his sole deed~~ a variance (3 Bac 698. Co L 283: 5 Co 119. 1 Vent 34. 2 Bl Rep. 950. 1 Bos & P 72 —

= But if it appears by the decla.n that the Deft. & another were jointly bound by the contract, & that the other is living, the nonjoinder of the latter is an incurable defect not aided by verdict (3 Bac. 698. 5 Bur 2614. case cited 1 Vent 34 — If two are sued on contract when one only is liable advantage may be taken of it under the gen.l issue (1 East 48. Phelps vs Battle &c Sup. Co. — N.B. In an action on joint Contract if Pltff. enter a noli prosequi as to one, he cannot have judg.t ag. the other Deft. Expe. N.Y. Rep. Vol 3d. 76 — & 5th Vol. 47 —

6 - Pendency of a prior suit for the same thing between the same parties, is a good cause of abatt. — For the law abhors a multiplicity of suits - & the intention of the Rule is to prevent the Pltffs unnecessarily harrassing the Deft. (1 Bac. 13. 1 Str. 48 — But both suits must be of one kind, or at least concurrent or the rule does not hold - & the cause of action in both the same. Ex. Trespass & trover (Mo. 418. 539. 5 Co 61. Hob 184 4 Co 43. 1 Com. 49. 50 — But Eject.t by mortgagee is not pleadable in abatt. to Debt on bond, for the party is entitled to both remedies — "This is a good plea tho' the prior action is in a diff.t Court. Except in Eng. if it is in an inferior Court (5 Co. 62 4 Bac 48. 1 Com 49, 50. 2 Wils) It is not necessary that the first action be pending at the time of pleading in abatt., ~~if it was pending at the time~~

~~pleading in abatet.~~ if it was pendg at the comt. of the second, the latter is vexatious ab initio 1 Bac 13. 4 Bac 48. 4. H 6th 24. Dact. plea 10 —

The suit is consid. as pendg from the time of the writ's issuing (1 Bac 41. 2 Haw. 275 Sid 6. 677. Cro. J. 11. 5 Co. 48. 3 Burr 1423. 1 Root 486. — Contra Sal 89. 7 Co 30. a Comp 454. 3 Rl 273 — Suppose the first writ never served — Haw 275 — Que. as to Cont. evidence — It has been decid. by our Sup. Court that if the first suit is wholly ineffectual, ~~that the~~ 2d. shall not abate for the first in that case is not vexatious — Ex. If the propty attach. on the first suit is of no value. or not the propty of the deft. — So too if the first action is clearly misconceived (Thrall vs Barber, Kellogg vs Miller Decd. 1802. Co Ct. — 1 Root 365. 562 — This is agreeable to the spirit of the Eng. rule supra. for it is not vexatious —

The pendency of an action on book does not prevent the deft. from suing the Pltff on Book (1 Root 155 — vid. Stat. 136 —

This plea is good tho' there be a new deft. added in the second suit Ex. the first vs A. the 2d. vs A & B. & good for all as it seems (1 Bac 13-14. 4 Bac 40. Hob. 137. Car 96-7 — contra — Lutw. 42 doubtful. 1 Show. 71 — see 1 Com. 49 —

So too tho' one of the defts in the first is omitted in the 2d.; Ex. first action vs A & B. & 2d vs A. only (1 Bac 13-14. 4. Bl. 49. Cart. 196-7 — Hob. 137 —

If the second is com. on the same day on which the first is abated. it shall be presumed to have been sued out after the abatet. & shall not abate (4 Bac 49. 1 Bac 14. Gilb. His. of Com. Pleas 260 — It is no cause of abatet. that another action for the same cause is pendg vs a stranger Ex. Sevl. trespassors sued in sevl. actions (Stra 420. 1 Com. 50. Hob. 178 —

So it is no cause of abatet. of an Indict. that another is pendg vs the deft. for ye same offence — The Ct. in its discretion will quash ye first for ye Ct. has a kind of discretionary ~~—~~ control over indictts. but not of Informations & appeals — No such control (1 Bac 13. 1 H. 36. 48. 2 Haw. 190. 275. 367 —

If two Informations are exhibited by diff.t persons on the same day; each will abate the other (1 Com 49. 4 Bl. 128. Mo. 864-5.

7 - The writs having unduly issued or not being legally authenticated is a good cause of abatet. - So in genl. is any irregularity, or informality in the writ - Ex - If made returnable to any other than the next succeeding term of y.e C.t; there being suff.t time for legal service for y.e next term (1 Root 315. 316. - indeed the process in such case is erroneous; & in Eng. void - as I suppose it is here (3 Wils 341. Sal. 700 -

If the writ be not signed by proper authority it is void & will abate - So in Con.t if there is no certificate of the ~~costy~~ - So, it will abate for many other defects; as want of date, impossible date &c (1 Com. 46. 2 Jon. 83. 1 Show. 80. 1 Lev. 2. 6 Co. E. 592. 1 Sid. 304. 4 Bac 43. &c -

The date is not amendable in Eng. (1 Com 46. 1 Show. 80. Secus in Con.t, as it seems - Wadhams vs Lurdon E. C.t -)

If the writ has a defective return it abates - Ex. less than 15 days in Eng. between the ~~teste~~ & return (Co. E. 50. Sal. 63. Lutw. 25. 1 Sid. 406. 2 Keb. 401 -

= So in Eng. if the service is insuff.t upon the face of it - Secus if good upon the face. For it can not be contradicted to defeat the suit: but def.t is left to his action for a false return (Stra. 813. 1 Bl Rep. 393 -

So in Con.t if it is ~~indiff~~ insuff.t either upon the face of it, or in fact - for here the ~~suff~~ indors.t may be contradicted

In Con.t if propy is attach.d & no copy left the writ abates. St. 35.

Omitting to leave a Copy at the Town Clerk's Office, where real propy is attach.d is no ground of abatement - the sole object of the Stat. on that point is to give notice to 3.d persons (St. 35

Want of venue in y.e writ is cause of abatet. in Eng. & if in the Declaration it is cause of demurrer (1 Com. 45. 5 Bac 322. 7 Rep 243.

But in transitory actions the venue's being wrongly laid is not Com law no cause of abatet. tho' the Common motion may change it (1 Bac. 35. Sid 4. Sal. 669. 670. 1 Bos & P. 20. 245. Cowp 510 -

Of Pleas & Pleadings (Abatet.)

In local actions, it is cause of abatet. as that the land lies in another County (1 Bac. 34. 1 Com. 47. 117. 118. 123. 760. 2-3-

The Rule in Cont. as to what County actions must be brought in is given by Stat. (26—

—As to the mode of pleading in Abatet. & effect &c.

Pleas in abatet. concludes to the writ or (as the case may be) to the declaration, by praying judgt. of the writ (or declaration) that the same abate (or be quashed) 3 Bl. 303. 4 Bac. 50. 5 Mod. 132. 144

It is said that when the matter of abatet. is dehors, the plea concludes with "praying judgt." only— this distinction I believe is not attended to (4 Bac. 50. 1 Sh. 15. Mo. 36. 1 Bac. 15—

= The character of a plea is decided, it is said [Lucas 112. 4 Bac. 50] by its conclusion, without regard to the matter of it or its beginning— see also L. Ray. 694. 12. Mod. 524. 1 Sid. 189. 1 Sho. 2 6 Mod. 103. Lutw. 34. 36— But according to Ld. Holt the beginning & conclusion form the criterion (4 Bac. 49— And he takes this distinction:— Tho' the matter would be good in bar; still, if the plea begins & concludes in abatet.; it is a plea in abatet.— But if in ~~bar~~ such case it begins & concludes in bar; it is a plea in bar— (4 Bac. 49. 1 L Ray. 593. L Ray 1018 & cases cited 6 Mod. 103. (Suppose the matter not good in bar

= But it is said that if matter which is good either in bar or abatet. begins in bar & concludes in abatet. or vice versa the Pltff may answer it, as a plea in bar, or abatet. (4 Bac 50. 1 Vent. 136. 3 Mod. 281- (The judgt. dift. in the two cases vid. post)

Sed quere— Whether the Conclusion alone does not decide— ut supra— As to the form of beginning & concluding in bar & abatet. see (3 L Ray 11. 53-57- 92. 107- 116—

— Plea in abatet. which is founded on matter which goes in bar only, is not good— So of a Plea in bar founded on matter which goes in abatt. only (4 Bac 46-7, 50- 1 Bac 14. 85. 1 Mod. 244. Co L 128. 129- 12 Mod. 400— Secus in both cases if the matter is such as may be pleaded in either way— Thus outlawry & alienage may in certain cases, be pleaded to the disability or in bar (4 Bac 50. 1 Mod. 244—

So that the cause of action had not accrued at the comt. of the suit, is pleadable either in abatet. or to the action & if it appears on the Record, judgt. for the Pltff will be erronious (1 Com. 105. 37. 2 Lev 197. Hob. 199. Lutw 8. 1 Lutw. Cart. 114. Show. 147. Cro. E. 325. Cro J. 69-70. Yelv. 70—

= Deft. may not at one time plead two causes of abatet. of the same kind—Ex. gr. Two outlawries, excommunications &c—But sevl. causes of difft. kinds, he may (4 Bac 51. 118. 1 Bac 15. Carth 8. 9. 1 Com 66. Co L 304a.— quære de hoc. & vide post—

= When a cause of abatet. is pleaded, & judgt. rendered upon it, error lies as well as on a judgt. in chief—

But an abateable defect is no ground of error unless it is pleaded, for otherwise it is waved (3 Bac 151. 6 T. Rep. 766— To this rule however there are exceptions in certain cases, where the defect is such, as goes to the action—one, of which, advantage may be taken in any stage of the proceedings (Ex. If feme Covt. is sued alone (4 Bac 39. L Ray 594. Stra. 254. 2 Rol. Rep 53. So to sci. fa. on judgt., the deft. is not allowed to plead in abatet. any thing which he might have pleaded in the origl. action (4 Bac 51. Sal. 2. Cro. E 283. 575. Co L 303—

A plea in abatet. does not regularly go to the merits of the cause; a judgt. upon it is in genl. no bar to a subsequent action for the same cause: secus, where judgt. goes in chief (as in some few instances it does) 4 Bac 29. 1 Ls. 4 Co 43. 6 Co. 7.—46. 8 Co 37b.—98. 2 Vent 170—

The judgt. in a Plea in abatet. if for the deft. is that the writ (or declaration as the case may be) be quashed or abated (4 Bac 51. 1 Vent. 22. 2 Show. 42— If the judgt. be for Pltff on demurrer to the plea, it is Respondeat ouster (3 Bl. 303. 396—7. 4th Bac 51— "But if an issue in fact be joined on the plea, (as when the matter is dehors, it may be) & found for the Pltff, the judgt. in Eng. goes in chief—quod recuperet—(4 Bac 51. Yel 112. 1 Bac 15. L Ray 594. 6 Mod 23. L Ray 117. (But not so on Indictt. for capl. offences (2 Haw 334. 1 Bac 15. 4 Bac 57—

In Pleas & Pleadings (abatt.)

So in Conn.t if the issue is closed to the Country— for there shall be but one trial by the jury— If to the Ct. a respondt. ouster. 2 Swift 271—

If matter of abatt. is pleaded in bar, judg.t in chief is rendered for the Pltff (2 Ray 1020—

Deft. can not demur in abatt. i.e. matter of abatt. is no cause of demurrer— for demurrer goes to the pleadings only (1 Bac 15. Sal 220. 1 Show 91. 7 Mod 97) & judg.t goes in chief— Secus in Inditt. for capital offences: i.e. judg.t not final 2 Haw 334

After judg.t of respondeat ouster, a second Plea in abatt. shall not be rec.d— for deft. might plead thus, in infinitum (1 Bac 51. Hob. 126. 2 Saund 401— Secus where after judg.t that the writ abate— Pltff has amended— for it is then a new writ (Kirb. 5—6—

After a genl. imparl.ce (contin.ce) the deft. can not plead in abatt. unless the cause of abatt. arises afterwards (3 Bl 316 1 Bac 9. 4 Bac 29. 143.) There is the same rule where the time for pleading in abatt. is past. Ex. 4 days in Eng: in Conn.t opening Ct. 11. of 2d. day in Sup.r Ct.— Impanneling the Jury in Com. Ct. (Stat. 342. 1 Root 564) secus where the law conti.ts the action from 1 Day; as in foreign attachts. And matter of abatt. can not be pleaded after the rule is out, unless it goes also in bar— & then it must be pleaded in bar Ex. Outlawrey in some cases— Feme Cov.t sued alone &c—

In Conn.t a plea in abatt. not answered stands demurred to; but this is not usual in practice lately Kirb. 49—

II. Of Pleas to the action—

1. The gen.l Issue—

Issue is defined to be a single, certain & material point issuing out of the allega.ns & consisting regularly of an affir.ve & nega.ve (2 Bac 5 Com. 12.2. Co L. 126.a

According to the old strict rule there must be a direct aff.ve & nega.ve to form an issue (Co L 126.a Vent 213 4 Bac 55. 70. 2 Bl Rep 1312. 8 T Rep 278 (& so gen.ly is the rule at this day) Ex. one pleaded that J. S. was dead the other ~~that~~ he was alive - this is not a prop. issue 1 Vent 213 — —

But the rule has been a little relaxed in modern times - Ex. Def.t pleads ~~that~~ he was born in France - Pltff replies ~~that~~ he was ~~not~~ born in Eng. holden a good issue (1 Wils. 6. Bast 554. Stra. 1177. = Sir T. Jones 6.) Such issue is suff.t if the 2d aff.ve is so contrary ~~to the~~ 1st ~~that~~ & first cannot in any degree be true (Stra 1177.- In a writ of right issue is formed of two aff.ves - demandant declares that he has more right than the ~~Deft~~ tenant, & the tenant pleads that he has more right than the demand.t (2 Stra 1177-& 3 Bl 305

It is always safest to close the issue according to the old strict rule & indeed, ~~a~~ any qualification of it tends to looseness & uncertainty - & the rule becomes vague —

= The gen.l issue is a denial of all the allegations in the declaration (3 Bl 305. 4 Bac 52) —

A special issue is one which is joined on some particular part of the Declaration, or some special matter alledged (Co L 126.a 5 Com 12.2) in subseq.t pleadings -

To actions founded in any misfeasance, not guilty, is a proper ~~plea~~ genl. issue — To Debt on simple contract nil debit — if on a specialty, Non est factum, — if on judgt. nul tiel Record — To acct. never bailiff &c — To asst. non asst. To replevin non cepit — To Disseisin in Cont. no wrong (3 Bl. 305, 4 Bac. 54. Co. E. 257. 3 Mod. 324 L Ray 1500. Skin 28) To Debt on penal Stat. not guilty seems a good plea (19 Rep. 462 — 4 Bac 84. Noy 56, Co. E 257. Not guilty was formerly holden, a good genl. issue to asst., but it is not so now — yet is aided by verdict (4 Bac. 58. 84. 1 Lev 142 Stra 1022. Esp. 167) In Debt for Rent, riens in arrere, is a good genl. issue — Seems in Cont. (Comp 588, 1 Brownl. 19. —

The genl. issue refers to the Count, not to the writ — Plea to the action — Ex. in acct. the writ charges the Deft. as receiver generally — the Count as receiver by the hand of A. (Co L 126 4 Bac

The genl. issue (like all issues in fact) concludes, regularly, to the County, & is tried by the jury (Co L 126. 3 Bl 313. 315. 4 Bac 54) But not in all cases even at com. law —; For there are other modes of trying such issues in certain cases at Com law. Ex. by record, inspection, certificate, battel &c (3 Bl 330 &c —

And in Cont. the parties may in all cases by agreet. put issues in fact to the Court (Stat. 26-7) Before single magistrates there is in Cont. no jury —

The form of tendering an issue in fact — If the traverse or denial, comes from the Deft. he concludes thus "& of this he puts himself on the County (or Court in Cont.) for trial" — If from the Pltff, thus — and this he prays may be enquired of by the County" &c) 3 Bl. 313. Co L. 126. 4 Bac 54) In either case the issue is joined by the opposite party's adding, "and the Pltff (or Deft) doth likewise" (3 Bl. 315) — This is called adding the similiter —

When in Cont. an issue in fact is put to the Court, the party tendering it must express in the conclusion, that it is done by agreement — Ex. "& this by agrt. &c" —

An issue always closes the pleadings, & when well tendered must be accepted (4 Bac 55, 3 Bl 314, Co L 126. 1 Saund. 338. Comb. 86. Gilb. 88)

If not well tendered it may be demurred to—

The words, "in manner & form," which are gen^ly used in tendering an issue, are some times of the substance of the issue, & some times words of form only—

Rule— If the issue goes to the "point of the action (i.e. to the material allegations in the declaration) they are words of form only— Ex. gen^l. issue pleaded to a battery laid to have been with swords, clubs &c,"— But when issue is taken on a collateral point, arising out of the pleadings they are of the substance of the issue. Ex. Deft. pleads feoffment by deed— Pl^ff traverses it modo & forma— Here a feoff^t. without deed (tho' good at Com. law) can not be found (Lit. §§ 483. Co. L. 281^b. 4 Bac. 56—

An immaterial issue is one taken ^a point, which does not decide the ~~point~~ merits of the cause— Ex. on matter immaterial, impertin^t. surplusage &c.— such issue is not aided by verdict, but a repleader will be award^d. (4 Bac. 56) "Arrest of Judg^t."—

An informal issue is one not rightly taken in point of form— this is aided by verdict (4 Bac. 56. 1 Bac. 103. Carth. 371. 1 Lev. 32. 6 Co. E. 227. 2 Mod. 137. 10 Mod. 19. to both rules—

—Issue can not be joined on a negative preg^t. or an affirm^ive preg^t. Ex. Plea of release since the date of ^the writ, replication that it is not his deed since ^the date of the writ, is a negat^e. preg^t.— such defective pleadings are cured by verdict: Lit. seems can be taken advantage of only by spec^l. demurr^r. (4 Bac. 98. Co. L. 120. 303. 1 Root 88. 5 Bac. 201. 6 Co. J. 87. 212.—

Tho: the gen^l. issue covers the whole declaration so that under it the Deft. may contest all the Pl^ffs allegations— yet in some cases the gen^l. is proper even to actions on special contracts, where the facts are not intended to be denied; as where the contract is void through an absolute incapacity in the obligor— Ex. a bond by feme cov^t. (1 Pow. Con. 97. Sal. 7. 2 Bl. R. 1082, Gilb^t. Law of Evid^ce. 162. 2 Wms. 125. 6 Mod. 311. 12 Vin. 181. 3^d. Keb. 12 Mod. 609. L. Ray. 88-9.—) But if the deed is void in its own nature, & not from incapacity, the gen^l. issue is not proper. Ex.

So if it be only voidable, as in case of duress (2 Bl 292 Esp 223) So if the incapacity of the Obligor is not absolute Ex. Bond by an Infant idiot &c (Esp. 223. 4 Bac 54. 62. 5 Co 119 Plow. 66. Gilb. L.E. 162. 3 L Ray 313. Hob. 72. 166. Sal 675. Stra 498 Cro E. 915. 3 Bur. 1805 -

= It is a genl. rule of ye Com law, that if a Specialty is made void by St; the special matter must be pleaded - non est factum is not proper. Ex. in Usury (5 Co 119a Hob. 72. Esp 223. 224. Gilb L.E. 163. 2 Bl. 1108) So Duress must be pleaded (Esp 223 -)

But rasure, alteration, want of compleat delivery are taken advantage of under the plea of non est factum (5 Co 119 11 Co 27a. Esp 223-4 -) And generally matters of fact only are in question under a plea of non est factum (Esp 224) not matters of law - tho with the excepn. mentioned ante in case of feme coverts -

It is a genl. rule in Eng. that in actions of Ind. Asst. any thing which shews that the Pltff has no right to recover at the time of the plea pleaded may be given in evidence under the genl. issue; the promise laid being merely a legal consequence of the duty stated; whatever extinguishes the duty discharges the promise - Ex. usury - duress - infancy - release - payt. &c Stra 498. 4 Bac. 601. 2 Rol 682-3. 3 Bur. 1353. 2 Bur 1010. L Ray 787. 2 H Bl 143. Doug. 108

Quere. does this Rule hold as to special Asstts.? - It seems not on principle (Chit. 197-8. Esp 147. 4 Bac 60-1. 134. 5 Mod 18 L Ray 566) But I do not find the distinction expressly taken - ideo dub. -

= But the Stat. of Lim. - tender - accord & satisfaction - (qu. L Ray 566) set off - bankruptcy - must in all cases be pleaded (Chit 198. Esp 147. 3 Bac 518. L Ray 153. Tidd 375) they being matters of Law which go not to the gist of the action but to the discharge of it (This rule it is said, applies ~~goes~~ as well to ind. as to spec. asst. - sed quere) that is, they do not deny that there was once a cause of action: Neither does paymt. nor release (supra) -

Of Pleas & Pleadings (Genl. issue)

In debt on simple contt. ye Stat. of limitn. may be given in evidce. under the genl. issue - So of a release (2 Ray. 566. Sal 278. 5 Mod. 18. Esp 262. 2 Swift 215, for nil debit is in the present tense (see 4 Bl 143. Doug 108 -
How far does the above genl. Rule apply to actions on the case generally? (3 Bur 1353. 4 Bac 61 -

In actions of Asst. advantage of the Stat. of frauds may be taken, under the genl. issue (2 Swift 214. 1 Root 92

This looseness of pleading (see genl. rule, supra) is not allowed of in Eng. in case of torts, any more than in actions on specialties - a Release must be pleaded - so of licence - so of any justification (see tres-pass &c) (4 Bac 60. 1 Rol 682, 5 Mod. 252, Hob. 174-5. Cowp 478. Esp 311. Bull 17. C L 282 b -

- In Cont. the Rule introduced by Stat. & applicable to all actions, is, That the deft. may give in evidence under the genl. issue any matter of defence or justification, except some act of the Pltff by which the deft. is acquitted or saved from ye Pltff's demand (Stat. 342)
The act of the Pltff here mentioned is some act which operates as a discharge of a right of action once existing Ex. Release - accord - award of arbitrators - former recovery &c (2 Swift 208 -
- An act of the Pltff antecedent to the alledged cause of action, & which operates as a justification, may be given in evidence - Ex. Licence - (2 Swift 208 -
So I presume any other act of the Pltff which shews that he never had a cause of action - Ex. Duress (Kir 629) in an action on contract - So usury - infancy, coverture &c — It is said to have been lately decided by ye Sup. Ct that usury must be pleaded to an action on Note - & so holden obiter as to Infancy - Quere —

Pleas & Pleadings (Genl issue)

In Cont. the Stat. of limitn may be given in evidce under the genl. issue, in book debt—so in cases of tort— Secus in Eng in case of torts. it seems (3 Bac. 518. 4 Bac. 61—

It is said by Swift that it cannot be given in evidce in assst. because it contradicts the plea (2 Swift 215) Que. Stat. 32.2 — vide 2 H Bl 143. Doug. 108—

= In book debt a release may be given in evidence under the genl. issue, the excepn. in the Stat. (supra) notwithstanding— For the Stat. was not intended to prevent the deft. from giving in evidence any defence, which he might at com. law: & the release is within the terms of the issue (Ld Ray 566. Sal 278— Secus as to indebt. assst. (Brace & Collins. S.C. Feby ter 1804— Ct. of Errors June 1804— Quere as to ¾ principle—

The deft. may, instead of pleading the genl. issue, deny any single traversable allegation, which goes to the gist of the action (demurring to the rest) & conclude to the Country— (4 Bac. 60.67. Co L 282 Yelv. 195)—(vid. special issue &c)—

But a special plea (i.e. one alleging new matter) amounting to the genl. issue, is regularly inadmissible— it lengthens the Record unnecessarily, & tends to refer questions of fact to the Court— Ex.. Allibi. in trespass— So pleading property in a stranger, or in the Pltff him self in trespass (5 Bac. 201. 4 Bac 62. 134. Hob. 127. Cro E. 268. 329. Esp 318. 413. 1 Vent. 249. 3 Lev 4. Cro E. 157. 2 Lev, 210. 3 Bl 309. 10 Co. 95—

Title, however, is in Cont. pleadable to an action of trespass on land—(Stat. 4.25) & at com. law by giving colour (3 Bl 309)

To the first rule, supra. there are exceptions.—

1st Special plea amounting to the genl. issue is good, if it contains special matter of justification— Ex. Deft. in assst. & batty denies the force, & justifies specially, a molliter manus &c (4 Bac 61. 3 Lev. 41. Cro C 268. Esp 318. 5 Bac 202) for matters of law ought to be shewn to the Court (4 Bac 60. Hob. 127—

2 So the Court in its discretion may allow such a plea, in some cases. Ex. if the facts pleaded may be a scruple in the lay gents – 4 Bac. 62-3. Cro E. 871. 2 Mod. 272 3 Bl. 466 (Seems if the defence is mere fact – Ex. alibi)

3 Pleading specially what amounts to a gen.^l issue, when not warranted as above, is said to be a good cause of special demurrer, 10 Co. 95 – 4 Bac. 60. 134 5 Id. 202. Cro C. 112. 157. Jenk. 306. But still, it seems the Court may, in its discretion, allow it supra. Cro El. 872 – According to other authorities it is no cause of demurrer but of a motion to the Court that the gen.^l issue or a nil dicit, may be entered, 5 Bac. 201. 202. Hob. 127. 1 Leon. 178. Cro J. 165. 2 Mod. 274. 5 Mod. 18 –

But clearly, if the Court will not allow the plea & the deft. refuses to plead the gen.^l issue & joins in the demurrer; judg.^t will go against him (4 Bac. 134. 10 Co. 94 – Jenk. 306 – Or after the Court has disallowed the plea, if the deft. will not plead the gen.^l issue, the Pltff may take judg.^t by nil dicit, 5 Bac. 202, 4 Id. 61. Cro J. 165 – 319. –

In Conn.^t the practice is to demur specially to such pleas – & judg.^t is rend.^d as on demurrer in other cases –

A special plea alleging facts which in evidence would support the gen.^l issue, does not necessarily amt. to the gen.^l issue – Ex. Plea of release to debt on simple contract – So of infancy & coverture, duress &c. in Connectt – (Chit. 197-8. Ld Ray. 88-9. Sal. 394. 5 Mod. 18. 4 Bac. 62 – 134 – Com. 76 – Carth. 356 –

And in gen.^l no plea which admits that there was once a cause of action, or that the allegations in the declar.^n are true, amounts to the gen.^l issue; tho' the facts pleaded might be show

been proved under the genl. issue. (Ld Ray 82.9. 566. 787.
4 Bac 62. 134 – 6 Mod. 197–8. 6 Co E. 871. Co L. 282b. 283a –
– For in such case the defence is matter of law. Ex.
Feme covt. may, to debt on bond, plead her coverture (Ld Ray
88–9) to the action – she admits the facts but avoids
them by matter of law – So of release &c. supra –
And in Cont. it is customary to plead specially
other defences than acts of the pltff, especially in
~~in matters of &c~~ in actions on contract; tho' in
cases of tort, the genl. issue is almost always pleaded
Pleading specially what amounts to the genl. issue,
is warranted at Com. law in assise & trespass, by giv-
ing colour to the plff, i.e. by alleging some feigned
matter in the pltffs favor, in order to justify in answer to it,
a special statement of the defts title (4 Bac 102, 10 Co. 90–1. 88 (co J
122. 3 Bl. 309. –
– A ~~special~~ plea stating special facts, which go to prove the
genl. issue, & concluding with the genl. issue, is good – Ex.
~~that~~ the deed on which it was delivd. to J.S. as an escrow, & so not
his act &c – So that it has been altered by the pltff &c –
So ~~that the~~ deft. was a feme covt. at the delivy &c – Genl. issue
wt. an issint – Gilb. L.E. 164–6 – 4 Bac 62, 89. 5 Com 85. 87 – Sal. 274 – 1 Vent. 9. 210. Plow 66 –
This plea according to some must conclude to the
country (3 Leb. 26. Plow 66. 1 Vent. 9. 210. 4 Bac 62. 89 –
According to others it may conclude with a verificatn.
Gilb. L.E. 64–5. Noy 112 Mo 30 – if it does so conclude it is
not a plea of this kind – not the genl. issue with an issint, but a spe-
cial plea – ut supradicta –
It is useful in giving notice to the pltff of the true defence
& confining the attention of the jury to the particular facts
stated – Gilb. L.E. 163–4 – It may be demurred to (it seems)
even when it concludes to the country – (Gilb. L.E. 164–5 sed quere

Anciently if the deed, (tho' executed in point of form) was originally void by reason of something extrinsic, as coverture, or became so by something ex post facto - as rasures & interlineations &c - the deft. was not allowed to plead the genl. issue, except with an ipso facto - But it is otherwise now (Gilb. L. E. 163-4. 5 Co. 119 -

Lord Holt says that all special non est factums are impertinent; as they subject the deft. to the onus probandi - (4 Bac. 62, 6 Mod. 218 -

2. Of Special Pleas in bar -

A special plea in bar is one, which it is said admits the facts stated in the declaration & avoids them (4 Bac. 2. Dy. 66 - This tho' generally, is not universally true - for a plea in bar sometimes traverses a part of the declaration (4 Bac. 70. 95. Hob. 104. 2 Vent. 79. Cro. E. 30. 418. Lutw. 38. Pop. 101 -

But it does admit all traversable allegations which it does not traverse - & is in avoidance of what it admits (4 Bac. 2. 73. Sal 91 -

A special plea in bar always advances new special matter, & is usually in the affirmative tho' not always - (3 Bl. 309) - Hence it must always conclude with a verification, instead of closing like the genl. issue, to the Country. For until a proper issue is tendered, each party must have an opportunity of answering the allegations of his adversary in either of three ways; viz. by denying them - demurring to them - or confessing & avoiding them by new matter of his own (3 Bl. 309. 310. Doug 59. Cowp 575. 2 Bur 772. 3 Bl. 1725 -

But pleas that form a compleat & proper issue, must conclude to the Country (5 Com. 86. Ray 98. Carth 88 -

Of Pleas & Pleadings (Pleas in bar)

All pleas admit of course what they dont deny - Hence nil debit is not a good plea to debt on bond - For the execution of the bond is admitted, & the cause of action not avoided (4 Bac 83. Hard. 33. 332 -

Cokes genl. rule is that every deft. must plead such a plea, as is pertinent & proper, according to the quality of his case (Co L. 285. 303. 4 Bac. 83.) (i.e. he must plead a good plea) -

= A plea in bar must answer the whole gravamen, or cause of action; otherwise it is ill for the whole - Ex. Asst. & batty & wounding - a plea justifying the Asst. & battery only, is ill (4 Bac. 86. Cro E. 268. 3 Lev 375. Hob. 327-8. 1 Lev. 16. Esp 318. L Ray 229. 5 Com 64-65 -) So in trespass, if a release is pleaded, all trespass before must be traversed (Hob. 104 -

[Tho' the deft. may make dift. pleas to dift. parts of the Declaration - vid. post]

= Thus in an action against a bailee to keep & carry the goods delod. to him for that purpose, a plea that he was discharged from keeping is ill; for it does not answer his allegan. to carry (4 Bac 88. Hob. 28 -

So in an action for the words "She is a thief & has stolen £20;" plea "she is a thief & stole two hens" is ill (4 Bac 89, Cro J. 676. 2 Rol 414 -

But a justification which answers the gist of the action, covers all matters of aggravation - Ex. Trespass for breaking & entering the Pltff's house, & expelling him therefrom - a plea that justifies the breaking & entering is suft. - for the expulsion is only agravation, unless the Pltff makes a novel assignment in his replication (3 T. Rep 292. 2 H. Bl 555, 3 Bl 311 -

Of Pleas & Pleadings (Pleas in bar)

It was anciently necessary for the deft. to set forth specially all the particulars (however numerous) of a defence, consisting of special matter of avoidance (Co L. 303. 8 Co. 133. 4 Bac 90) —

— Now genl. pleading is some times allowed to avoid prolixity, Ex. where the particular facts, if specially pleaded would tend to "infinite ness" as if one is bound to perform covenants, the performance of which, must consist of a great variety of facts — Hence he may plead performance generally (4 Bac 91. Cro E. 749-916. 1 Sid 215. 334. Co L 303. 2 Vent. 256. vid. Cont. book. (Cov. 15)

= But this can not be done where some of the covenants are in the negative — for negatives cannot be ~~proved~~ performed — as to these he must plead, that he has not done the act coven. against Co. L. 303. Cro. E. 691. 4 Bac 9- = 5 Com. 236, Esp. 305 — In this case, however, if the deft. pleads performance, advantage can be taken of it only by special demurrer (Cro E. 232, 5 Com 82 —

Repugnancy in a material point vitiates the plea — secus if in a point not material — for it is then surplussage (4 Bac. 94. Co L. 303. (By surplussage I understand either foreign matter or redundancy in an immaterial point) —

Of Traverse —

— A traverse is a denial of some particular point alleged in the pleadings, & always tenders an issue It may be taken to any part of the pleadings (4 Bac 67. Co L 282. Yel 195 —

It is said it closes the issue (4 Bac 67) but this is incorrect. A traverse properly so called, is with an absque hoc. & concludes, regularly with a verification (4 Bac 67. 6 B 24. 5 Com 109. Stra 871. 1 Bur 321. Doug. 421) Ex. Plea that I. S. died seised in fee – Replication that he died seised in tail without this &c – with a verification –

= Tho indeed a genl. travers, (i.e. one reaching the whole of what is alleged on the other side) concludes to the Country – Ex. De injuria de – absque tali causa. (4 Bac 67. 68. Doug 90. 412. Sal 4 – 7 Mod. 105 – 2 T. Rep 439. Cro. C 117. or 164 5 Com 98. 8 Co. 66. 1 Bos & 76 –

= It seems, however, that a genl. travers may conclude with an avert., or to the Country," in many Cases (2 T. Repp. 443) Que. How can it be proper to conclude with an avert. when all the allegations on the other side are denied, & issue tendered upon them? Can the opposite party possibly make a special answer? – A technical travers differs from a direct & positive denial of a fact, not only in diction, but genly in the conclusion; the latter must conclude to the Country: this is the proper mode when the party tendering the issue introduces no new matter Ex. Plea of usury, Repli. "good & lawful consid.n without this that it was corruptly agreed &c. with a verification – or "it was not corruptly agreed" &c closing to the country (4 Bac 67. 77. Rey. 98. 2 T Rep 439. 2 Stra 871. 1 Bur 321 – Quere. whether a wrong conclusion in these cases, is ill on genl. demurrer – it is according to Rey 94 & Cro 117. or 164 – doubted in 1 Vent. 240. – In Rey. to debt on bond conditioned to pay certain sums, deft. pleaded that he had pd

all — Pltff replied that he had not paid all, with a verification — holden ill on gen^l. demurrer. sed quere —

When an allegation on one side is expressly denied on the other, a formal travers is needless, ergo improper & demurrable, otherwise the parties might answer over in infinitum — Ex. Pltff avers performance on a condition precedent — Deft. directly negates it — Here is a complete issue — & superadding a travers of performance with an averment is improper (4 Bac. 67. 2 Stra. 871. Cro E. 755. 1 Vent. 101. Ray 98. Rast. 689 —

It is a gen^l. rule, when one party alleges new matter which is inconsistent with any of the antecedent allegations on the other side, but which does not form an issue a traverse of those allegations is not only proper, but necessary — Ex. One pleads, that his Co-deft was dead at the date of the writ; the Pltff replies that he was alive — Here a travers of his death is necessary — So the deft. alleges that J.S. died seised in fee simple — Deft. replies that he died seised in fee tail — he must traverse the seisin in fee simple (4 Bac. 67. 68. 70. Dy. 365. pt. 33. Cro E. 30. 3 Bl. 310. 1 Sid. 301. 1 Vent. 213. 2 Mod. 68) The new matter which precedes the traverse is called the inducement to it) —

= But the rule is not universal — & has been somewhat relaxed in modern times (2 Stra 1177. 1 Wils. 6 —) —

— When a party merely confesses, & avoids by new matter a traverse is not necessary — For what he alleges is not inconsistent with the other's allegation — Ex. Plea of Infancy. Repl^n. of a promise after full age — Plea of release Rep^l. per fraudem (4 Bac. 70. Cro J. 221. 2 Mod. 168) But the Rep^n. as it contains new matter

must conclude with an averment (3 Bl. 309) –

When a traverse with a verification is tendered, the issue is formed, by the opposite party's affirming over what is traversed, & concluding to the country (4 Bac 67. 68. Sal 4 Co L. 126a –

(What is meant by Coke's rule (Co L. 126a) "that an issue joined upon an absque hoc, ought to have an affirmative after it"?) (4 Bac 68)

The Omission of a traverse when necessary is said to be matter of substance (4 Bac 70. 2 Mod. 60 – 1 Leon. 43–4 contra & that it is form only –

It is a Genl. Rule that there cannot be a traverse upon a traverse ~~upon a traverse~~. By this is meant that when one of the parties has tendered a material traverse the other cannot leave it & tender another (upon the inducement) to the same point – i.e. the same ground of claim or defence – He must join it (4 Bac 67. 73. 79. 78. Co L. 282. that. 79. Hob. 104. 5 Com 119–120. 2 Mod. 183. 1 H Bl. 403 – Ex. The Defdt. pleads that J. S. was seised in fee – Pltff replies that he was seised in tail, without this that he was seised in fee – here the Defdt. must join & cannot traverse the seisin in tail – aliter, they might answer over in infinitum –

= But a traverse after a traverse is good – even tho' the first is material (4 Bac 73. Hob. 104. Co L 282b. 5 Com 120. Dy 101 –

This is one which does not go to the same point i.e. ~~same~~ the same ground of claim or defence, as is embraced by the first (104) & for these distinctions read Hob. on this subject –

To the rule that there cannot be a traverse on a traverse there are two exceptions – 1 When the first traverse is on an immaterial point, it may be treated as a nullity, & a traverse tendered on the inducement (4 Bac 73. 5 Com 120. 1 H Blac 376. Stra 117. Co L. 282b. Cro E. 99. Carth 116 – Hob. 104 –

2 When in trespass in the County of A. the deft. pleads a justification, with an absque hoc, that he committed in A, here the justification being local, the Pltff may leave the traverse, tho' material, & traverse the justification (Here is traverse upon traverse) & it is allowed to discourage foreign pleas, which are false — as they tend to oust the venue (4 Bac 73. Pop 101. 6 Cro E. 99. 418 Mo. 350. Lutw 1437. Cro C 105) in transitory actions

The party to whom a traverse is tendered, does not by joining in it, admit the new matter alleged (i.e. the inducement) to be true — For in genl. he is obliged to join (4 Bac 68) & when he is not the other can take no advantage of him, for joining — A protestation is some times used to avoid such admission (4 Bac 68) but it seems unnecessary — Indeed it can answer no purpose in the cause in which it is used —

= But the party tendering the traverse admits of course what he does not traverse — For he is at liberty to deny what he pleases (4 Bac. 2. 73 — Sal 91. — & vid. ante —

He may however avoid the admissn (so far as it respects any future claim, in another suit) by protestando — this does not oblige the other party to prove the allegatn protested against; but as to the principl. case it admits them (as it seems) — It merely prevents the Record from being evidence (in any other case) against the party protesting, as to the matter to which the protestn extends. (4 Bac 73. Col. 126 — 5 Com 126. — 3 Bl 311. 312 — A traverse can properly taken only on a material point, i.e. one decisive of the cause, otherwise the issue is immatl. (4 Bac 75. 2 Saund 5. 2 6 Co 24. a Carter 217. Comb. 321. 1 Rol. 235 — So — only on an issuable point — Matters of Law however material cannot traversed, nor a recital by way of inducet. 4 Bac 68. 81. 3 Mod 320 Latch 111 — Sal. 628. 6 Cro E 442 Hob 103. 1 H Bl. 376. 402. Cro J. 221 —

to– on a single point– i.e. a single ground of claim or defence– Otherwise it is multifarious & double– But the traverse need not consist of a single fact (4 Bac 68. 1 Bur 320. 1 Bos & P. 80. 8 East 66. Bul 93.– Nothing except what is alleged, can be traversed, for a traverse is a denial, on one side, of something averred on the other– And there can be no proper issue, but upon some allegation– Ex. action on a promise within the Stat. of frauds but not averred to be in writing (4 Bac. 68. 75. 87. 2 Rol. R. 37. 1 Ib. 235– 2 Vent 79. Sal. 628–9–

But it is said that such trav. is ill on special demurrer only. (4 Bac 75. 2 Lutw. 935. 1560–

When a party justifies, or, in any other way, confesses and avoids as to a part only of the material allegations on the other side; his traverse must be coextensive ~~with~~ with the part, not thus avoided– Ex. In trespass if the deft. pleads a release; he must traverse all subsequent trespasses– if a justifiment, all antecedent ones– if a licence, at a particular time; all before & after (Hob. 104. 2 Mod. 68. 1 Sid. 293–4. Esp 415. Sal 222. Cro E. 87. 1 Leo. 241. 307–

To the two last examples above there is an exception; as if the justification is laid on the last day on which the trespass is alledged to have been done– the day being agreed. (5 Bac 206. 3 Sal 42. 1 Bulst 138.–

And if the Plff in the last case relies upon a trespass, done on a different day, he must make a novel assignment. Bul. 17. Cro. C. 165, 514. 515. Ray 86. 4 Bac. 125. 3 Bl 311–

Traversing before & after the day, on which the justification is laid (ut supra) is not necessary it seems, if the deft. avers ~~that~~ the acts justified are the same, as those complained of– This is our practice (5 Bac 207 1 Bulst. 138. Cro. C 228, or 165. 3 Lev 277. Sal 64. Cowp 161. Lutw. 1457. contra Vent 184. S.C. 2 Keb 878–

Quere as a traverse well tendered obliges the opposite party to join (when the inducement & the traverse go to the same point,

as they almost always do) of what use in genl. is the inducement? - Ex. Plea of usury. "It was corruptly agd." Replication "Good & lawful consideration without this, that it was corruptly agreed &c" Rejoinder: "It was corruptly" - What purpose does the inducement answer? -

- In most cases it answers no other purpose than to usher in the traverse (when a direct denial would be suff.) & the traverse is only a conclusion from it -

- Ex. "J.S. died seised in tail, without this that he died seised in fee" - "J.S. is alive without this that he is dead - So of the last example, supra -

When used, by way of protestando, it may answer a good purpose - So where the inducement & traverse go to difft. points, or grounds of claim &c - Ex. Justification as to one day with a traverse as to all others, before & after - Here the inducement is a necessary part of his defence - But in general it is wholly useless.

Generally a traverse or denial pursues the terms of the allegation traversed - But that mode is not always right - Ex. Plea a release since the date of the writ - Replication not his deed since &c - Case for obstructing 3 lights - traverse of obstructing 3 lights - These are negatives pregnant, or an affirmative pregnant; & it is a rule that no issue can be ~~proved~~ joined on a negative pregnant or an affve. pregt. (4 Bac. 98. Co. L. 126.a 303.a 1 Roll. 88. 5 Bac. 201. 2 Leon. 197. 1 S. 6. 136 (The party should have traversed thus, not his act &c in manner & form &c - But such pleadings is aided by verdict - & is ill, it seems, on special demurrer - (4 Bac. 98. (10 J. 87. 312 - Quere. 1 Rol. 88 -

Of Duplicity — This is a fault in all, except dila-tory pleas — (Co L 304ᵃ. 4 Bac 118. 3 Bl. 311. 5 Com. 36. 55. Hob. 295 —
(Quer. What is the reason of this exception?) — [N.B. it is found on examination that this exception does not exist in Eng. but is a Connecticut innovation]
A double plea is one which consists of sev.ˡ distinct & in-dependent matters, alleged to the same point (i.e. the same ground of claim or defence) & requiring diff.ᵗ answers —
(5 Com 65. Co L 303ᵇ 304ᵃ. 4 Bac 118) —
But giving diff.ᵗ answers to diff.ᵗ parts of a declaration does not constitute duplicity — Ex. Traverse of one part & special matter in avoidance of another — Secus if each intended to the whole (Co L. 304.ᵃ 4 Bac, 118.—119 —
Duplicity is not allowed of because it tends to un-necessary prolixity — & to confusion & vexation (4 Bac 119 Plow. 190. Yel. 13. 1 Vent 47-8 —
Rule: Every plea must be simple, entire, connec-ted & confined to a single point, i.e. a single ground of ac-tion or defence (3 Bl. 311 —)
But this point need not consist of a single fact — Many facts may be necessary to constitute one compleat cause of action, or defence — Ex. In pleading an accord, award &c. all the particulars must be set forth (Bur 320, 4 Bac 68 —)
Distinct Counts in one declaration (each count being itself single) tending to establish one right of recovery, do not amount to duplicity — Secus if diff.ᵗ parts of the same Count requires diff.ᵗ answers (3 Bl 295 —
But surplusage never constitutes duplicity, nor do two distinct defences, if one is frivolous, or not issuable (4 Bac 119 1 Sid. 175. 1 Keb. 661 — Dy 42ᵇ. — Duplicity in a declaration consists in joining causes of action, which cannot be joined, as

Of Pleas & Pleadings (Duplicity

as contrast & tort) or distinct & unnecessary grounds of ~~defence~~ claim to enforce one right of recovery, as in Vent. 365. 6 Co. 14 or 20 — So in debt on bond the assignment of more than one breach is duplicity at com. law — It is unnecessary, for one works a total forfeiture (5 Com 36. 1 Rol 112. 2 Bac 134. 2 Vent 198. Com 197. 2 Wils — Secus in cov. broken, the action being to recover the actual damages (5 Com. 36. 4 Bac 131. 2 Saund 397. —

So, in Cov. in debt on bond — the actual damages being only recovered (Stat 27 —) — And now in Eng. by St. of 4 & 5 of Ann, deft. may, with leave of the Court, plead ~~as~~ to one action as many ~~pleas~~ distinct defences as he pleases (4 Bac 121 — No such Stat or pract. here

The Eng. Stat. comprehends no other than pleas to the ~~action~~ declaration — & the deft. may not plead two rejoinders to one replication: nor Pltff two replications to one plea in bar (4 Bac 121 —)

Advantage can be taken of duplicity by special demurrer only, pointing out wherein the pleading is double — & the party demurring must lay his finger on the very point — "duplex & caret forma is not sufficient (4 Bac 119. 2 Ld. 134. Sal 219. 679. L Ray 332, 798. 1 Leo 76. 7 Mod. 6 Co 6. 14 or 20. 1 Wils 219. 6 Co. 810. contra, 5 Com 36. 65 —

The last rule does not apply to cases in which the Pltff joins in one Declaration causes of action which cannot be joined; as distinct & substantive grounds of recovery — Ex. Ass. & Trover in two Counts —

Such misjoinder is incurable. (Sal. 10. Ray 2 3 Lev. 99. 4 Bac 11. 1 T. Rep 274. 8 Co. 87. Com 6 333 —

For the reason for inserting diff. Counts in one Declaration vide 3 Bl 295 —

Of Profert & Oyer—

It is a gen.l rule of common Law that where a party declares on, or pleads, a deed & makes title under it, he must make profert of it in Court—i.e. he must aver in his declaration &c, that he brings it into Court, (3 Bl. App.x 8811— —

= This is done that the adverse party may have oyer & a Copy of it— & that the Court may inspect it—(4 Bac 109, 113, 6 Co 38, 10 Co. 93. Hob 233, 5 Com 128—

The adverse party, when entitled to oyer, is not bound to plead without it— but if he does he waves it (4 Bac 113. 6 Mod. 283. Sal 119—

Profert is never made in Eng. of a Bill of Exchange or a promissory Note— they not being deeds (Chit. 185. Burr. 2433) In Con.t notes & all other unsealed writings are deeds, the want of seal notwithstandg.

If a right acquired by Deed will pass without deed, he who claims the right, is not obliged to plead the deed— of course he need not make profert of it— Ex. Assignment of a Lease is good at com. Law without deed— Hence in pleading the assignment the party need not shew that it was by Deed, even tho he was bound by contract, not to assign without Deed— Secus if the right will not pass without deed (4 Bac 110, 6 Co. 38. 1 Bulst. 119. Cro. E. 123. Stra. 259—

Yet where the right will pass without deed, if the party pleads the deed, & makes title under it, profert must be made (4 Bac 110, 2 Mod 64) Secus, if he pleads the deed without making title under it (6 Co. 38a—

A stranger to a Deed may plead it without profert — for it is not in his power (10 Co. 94. 4 Bac 111. 2 Show 418. 3 Lev. 83. Mo. 870. Plow. 149.—

So, generally any one, who comes in by operation of law, as tenant in dower, (4 Bac 110. Co L. 225. 5 Co 75. Jenk 305) There is an Exception in the case of tenant by the Courtesy, for he is supposed to have possession of his wife's deeds, & may retain them during his own life, (4 Bac 110. Co L. 226.a 10 Co. 94 —

Privies to Deeds, it is said, must make profert of them, i.e. in cases in which parties themselves would be bound to do it (4 Bac 111. Co L. 267. 317. 10 Co. 92, 94.) Ex. Particular tenant & remainder man — Quere as to the extent of the rule —

If a Deed is lost by time & accident, it may be pleaded without profert — So, if in possn. of the adverse party — Stating the special facts dispenses with the necessity of profert (5 Co. 74. 75. 3 T Rep 151. Wils 16 Stra 1186. 2 H Bl. 263. 2 Root 482, 1 Root 541 —

And when the Deed is only the inducement to the action or defence, profert is not necessary — Here title is not made under it (8 T Rep. 573. 10 Co. 92, 6 Co. 38

A profert in Cont. is never necessary, for oyer may be demanded without it — (1 Root 566) —

Formerly in Eng. omission of profert when necessary was matter of substance (Hut. 4 contra) Now by Stat. 16. & 17 Car. 2d & 4th & 5th of Ann, it is reached by special demurrer only (4 Bac 113, Cro J. 32, Hob. 301. Cro E. 217 —

When a Deed (or bill) is lost or destroyed (ut ante) a

Copy of it sworn to, or even parol evidence is admissible to prove its contents (Chit 205-6 - L Ray 713. 1 Atk 446) But it must first be made to appear probable to the Court ~~that it~~ is actually lost or destroyed -

The same evidence is admitted where the deed is in the hands of the adverse party (ut ante) But notice must be first given him to produce it - otherwise a Copy, parol proof &c, is not admissible (Chit. 206. Esp. Rep. 50. Peak. 165 -

Profert being made the adverse party may crave oyer of it, i.e. may demand as the word imports to hear it read (3 Bl 299. 4 Bac. 113 -

But merely hearing is not all that he is entitled to - He has a right to a Copy of it (4 Bac 113. Hob. 217 -

On Oyer granted, the party obtaining it may enter the Deed verbatim, on the record, & thus take advantage of any condition or other part not stated by the party pleading it - Ex. Condition of a penal Bond (4 Bac 113. 3 Bl 299 -

Of Departure

Departure is a dereliction of ~~the~~ a former defence, or claim, for another distinct from it, & not fortifying it - The Replication should fortify the declaration - the rejoinder the plea &c (4 Bac 122-3. 3 Bl 310. Plow. 105 - Co L 303b. 304a. 2 H Bl. 280. L Ray 1449. Stra 442. Ind. 7. Com. 99. 123. Ray 22 - Ex. of departure, One pleads in bar a feoffment in fee - & in his rejoinder varies his title or mode of acquiring it; as by pleading a gift in tail - a conveyance by Lease & release -

Of Pleas & Pleadings (departure)

So if the matter first offered, is pleaded, as at com. law; a subsequent plea supporting it by a custom, is a departure - Ex. Action on Indenture of apprenticeship - Plea Infancy, Repli^n custom of London this is a departure (4 Bac 123. 1 Lev. 81. 1 Keb. 376. 469. 572 - = So a plea asserting a right ~~at~~ at Com. law, is not ~~forfeited~~ fortified by another shewing a Stat. right - Ex. Trespass for taking beasts - plea damage feasant - replication - the deft. drove them out of the County, is a departure - for the driving &c. is not actionable at Com. law, but by Stat. of Marlborough 52 H. 3 and 1 & 2 Ph. & Mary (4 Bac 123. 3 Lev. 48 -

- But if one pleads a Stat. & the other alleges that it has been repealed; the former may reply, that it is revived, for this fortifies the orig^l ground 4 Bac. 123, 1 Lev 81 -

In Cov^t. if the deft. pleads performance, & pltff replies ~~that~~ he has not performed such an act; rejoinder ~~that~~ he was ready to perform it, & ~~that the~~ Pltff refused to accept performance, is a departure (4 Bac 123, 5 Com. 99. 6 Co L. 304^a) So - Plea infancy - Repli^n necessaries - rejoinder Release (Stra 422 -

McComb vs Fowler - Ct. of Errors: Ass^t. on an agree^t. to purchase of the Pltff stock of the bank of the U.S. - The declara^n avers a tender of the Stock, at N. York - Plea a law of the U.S. requiring all transfers to be made at the bank in Philadelp^a - Rep^n. tender at ye bank in Philadel^a; holden no departure - place first alledged not material - See Sal. 222, 4 Bac 125, 6 Mod 115 -

Departure is a substantial fault as it seems (Sal 222 Ray 22, 94 - Stra. 422, 6 Co L. 165. or 228 -) i.e. reached by gen. demurrer

Qu. is it aided by verdict? (Raw 86, semb. 4 Bac 125 - McComb vs Fowler) So I should think, if it contains in itself, a good & suff.t ground: For, on the supposition enough appears on the whole record to entitle the party to judg.t - Secus, it dem.d to: For the demurrer does not confess the facts; they being ill pleaded Ex. Plea infancy - Repl.n necessaries - Rejoind. release issue upon the rejoinder & found for the Def.t or demurrer to the rejoinder ——

Of Demurrer —

A demurrer admits such matter of fact alleged by the adverse party as are well pleaded; but denies their sufficiency in law - & thus refers the question of law arising upon them to the Court (4 Bac 129. 5 Com. 135, 3 Bl. 314. Co L 71.b — It is in strictness not a plea, but an excuse for not pleading (3 Bl. app.x 23. 24 4 Bac 129 - 130. 3 Wils 292 —

A demurrer may be taken to any part of the pleadings (4 Bac 129. Co L 72.a 5 Mod. 132 —

It admits no other facts than such as are well pleaded - Thus in Cov.t broken, the Pl.ff assigns some breaches well & others ill, & the def.t demurs to the whole. The Pl.ff in such case will have judg.t on those only which are well assigned (4 Bac 131. 5 Com 139. 1 Wils. 248, Holt 191. Sal 218, 2 Saund 279. 280. Hob. 56 —

It never confesses an aver.t which contradicts what before appears certain on the Record. Ex. One pleads a record & then makes an aver.t inconsistent with it (3 Leo 124. Co E. 24 or 35 - So of an aver.t of what is impossible 1 Sid 10. 5 Com 139 —

Of Pleas & Pleadings (Demurr.)

It never admits facts averred which cannot be proved — the aver. of such facts is itself a good cause of demurrer — Ex. Parol release pleaded to a Bond (1 Sid. 10. 6 Co. 44a. 2 Wils 376. Yel. 192. Cro J. 254 —

It never admits the truth of impertinent or immaterial averments (or of any which are not traversable) 5 Com 139. 4 Bac 131. Sal 561 —

It never admits conclusions of law, made by the adverse party from facts stated — It admits matters of fact only — (see the definition ante) — Hob. 56. 4 Bac. 131. Ex. Pout ei bene licuit in a plea of justification —

After an issue in fact joined there can be no demurrer — an issue joined closes the pleadings (5 Com. 139. 1 Show. 23 —

A demurrer is generally called an issue in law (3 Bl 314 – 315. Co L 71 – 2. 4 Bac 129) This is perhaps not strictly correct; it rather tenders an issue in law; for the issue is not closed, till a joinder in demurrer 3 Bl 313. 315. Co L 126a. 4 Bac 54 —

If there is a demurrer & issue in fact in the same case (as there may be on diff. parts of the declara— plea &c) the demurrer is regularly to be first determined — for in this way, the jury may assess all the damages at once — Secus if the issue in fact were first tried & both issues found for the Plff still it is in the discretion of the Court to try the issue in fact first (4 Bac 130. 5 Com 136. Co L 72a. 125b. Palm 517)

If in the last case judg. is for Plff on the demurrer; he may, if he pleases enter a non pros as to the issue in fact & have his damages assessed on the part demurred to only — Ex. Several breaches assigned in Cov. broken — some demurred to. & some traversed (4 Bac 130. 5 Com 136 Sal 219. Stra 574 —

There cannot be a demurrer to a demurrer — It works a discontinuance (4 Bac 131. L Ray 20. Sal 219. Comb. 306 —

Exception, when a demurrer to a plea in abat. is not ap-posite (Comb 306) Qu. what does this mean?—

In all other cases the adverse party must join (Comb. 306

Form of a demurrer in Con.— "That the declaration &c. & mat-ters therein contained are insuff. in law, & hereof he prays judg.d" Joinder: "That his declaration &c & matters &c are suff. & hereof he prays judg.d"

For the Eng. form, see 3 Bl appendix, 23, 4 Bac 130. Co L 71.b—

= In civil cases judg.d upon demurrer (except to a dilatory plea) is peremptory (4 Bac 132, Jenk. 306. Dy. 69. 341—

So, in crim. cases short of felony (4 Bac 132, Cro E. 196. 2 Haw. 334, 11 Co. 60, 1 Rol R 89) the deft. is not allowed to plead over—

But, in prosecutions for felony, or any capital offence the better opinion is that the prisoner may plead over, after his demurrer is over ruled (4 Bl 334. 338, 2 Haw 334. 2 Hale 239, Cro E. 196, 2 Hale 257, 315, 243 contra—

= Demurrers are of two kinds first genl. 2d. Special. (4 Bac 132, 5 Com 138, Co L 72—

- A demurrer assigning no particular cause, is genl.— one pointing out the special defect ~~is special~~ on which it is founded, is special (4 Bac 132, Co L. 172—

To constitute a special demurrer the cause assigned must be special— assigning a cause (if the cause assigned is genl.) does not make the demurrer special— Ex. "That the declaration is uncertain & wants form"— this is a genl. demurrer (4 Bac 132, 1 Wils 219, 1 Show 242. Comb. 297. 2 L Ray 798—

Formerly demurrers in Eng. were always special (4 Bac 132, 1 Vent 240) and Coke says that it is a good rule to make them special in all cases (2 Bulst. 267—

A special demurrer reaches all defects that a genl. demurrer does, & others which a genl. demurrer does not—

Of Pleas & Pleadings (Demr.)

It is a Genl. Rule that all substantial defects (i.e. the omission of such things as are material to the right of action, or to the defence) are reached by genl. as well as special demurrers— But defects in form are reached by special demurrers only (4, Bac 132–3. 10 Co. 88. Latch 185. Co. L. 72a. Hob. 127. 164. Hut. 15. 5 Mod. 18. Sal 291—

= It is here to be observed that in all pleadings, two things are necessary— 1st that the matter pleaded be suffn.— 2d that it be alleged according to ~~law~~ the forms of law (Co L 303, 4, Bac 2. Hob. 164—

The want of either of these requisites is a good cause of demurrer— If the plea is deficient in matter (or substance) a genl. demurrer is proper:— if in form only, a special demurrer is necessary (Hob. 232. 4 Bac. 2. 133. 7 Mod. 71. 2 L Ray 798. 802—

The omission of that without which "the very right" does not appear sufficiently, is a defect in substance The omission of that without which "the very right" does sufficiently appear (tho' not alleged according to the forms of law) is a defect in form only (Hob. 232–3

= Ex. of defects in substance: Pltff does not aver in his declaration performance of a ~~written~~ condition precedent— or omits to aver science in the Deft. in certain cases— Ex. of defect in form: Duplicity— Special plea, amounting to the genl. issue— want of venue in transitory actions—

When there is a total want of substance (as if one should sue another for not treating ~~him~~ civilly) or when a material allegation is omitted (as if ~~the~~ Pltff in trover should not state propy. or in trespass possn.) a genl. demurrer is proper (Hob. 133 198, 232, 301. Co. L. 72a. Carth. 389. 1 Com 138. Stra. 624, 3 Bl 394—

A special demurrer reaches no other formal defects than such as are specially assigned for cause of demurrer – & as to all defects not thus assigned it is but a genl. demurr. (4 Bac. 132, 1 Co. 88 –

= If on demurr. to the declaration judgt. is given for the Defdt, no similar, or concurrent action for the same cause can afterwards be sustained on the same grounds, as were disclosed in the first declaration – Aliter, if the Pltff failed for want of an essential allegation in the first declaration & which is inserted in the second: Here the grounds disclosed are diff. & the Pltff has not failed on the legal merits of the cause (4 Bac 116. 6 Mod 20) So, if the first was misconceived; Ex. Trespass when trover was the proper action – Here the two are not concurrent (6 Co. 7. 4 Bac 115. Cro E. 35. Hut. 8. 3 Wils 240. 304. Esp 165. 2 Bl 779. 827. Cro E. 667–8. 2 Vent 169. Ray 472. 2 Mod 318. 3 Mod. 1 –

And there is the same Rule, generally speaking if the Pltff failed in the first action, on the genl. issue, or a special plea in bar (6 Co 7. Cro E. 668)

But in Eng. a judgt. agt. the Pltff in one real action, is no bar to another of a higher nature, to try the same right – for it is not similar, nor concurrent (4 Bac 115. 6 Co 7) —

This rule cannot obtain in Conn.; for we have but one real action. to wit. disseisin —

Tho the declaration be insuff. through a mistake in pleading; yet if the Deft. takes no advantage of it, but pleads a plea in bar upon which the Pltff takes issue & the right of the matter is found for the Deft. the Pltff can have no other action for the same cause; for the merits have been tried, 4 Bac 116. Skin 120. 6 Mod 207 —

Of Pleas & Pleadings - (Demr.)

A Demurr. reaches back thro' the whole record & attacks the first defect in the pleadings - & tho' the parties join in demurrer upon a single point, the Court must give judgt. upon the whole record - Ex. Declaration insuffi.t - Plea in bar & Repli.n both good - demr. to Replication - Judgt. will be for Deft. (Hob. 56. 199. 200. 14 9 Co. 110. 4 Bac 131. 7 - L Ray 1080 - Sal 458. 640. 8 Co 133b. 3 Lev 244 - 2 Vent. 79. - as to the judgt. see arrest of judgt. -

But in debt on bond, for performance of Covt. on award &c, if the deft. pleads an insufficient plea; & the Pltff in his replication assigns no suffict. breach; the deft. shall on demurrer have judgt. tho' the declaration is good, & the plea ill - for in these cases the cause of action does not appear, till the replication is given - the Repli.n being a kind of supplement to the declaration - (3 Co. 52, 120b. 133b. Palm. 287. 2 Bulst. 94. Cro. J. 133, 221. L Ray 1080 -

Of Demurrer to Evidence

In certain cases when the Pleadings terminate in an issue in fact, one party may take the examination of the cause from the jury to the Court by demurring to, or upon the evidence, which the adverse party exhibits in support of his issue (4 Bac 136. Co L. 72. a lt 18, T. Ray 404. Bul 313,

A Demurrer to Evidence must be taken before the party demurring exhibits any evidence on his side. as it seems (1 Root 570) -

It is to be noted that the relevency of evidence is matter of law, to be decided by the Court; - its relevancy being established; the question, how far it con-

duces to prove the issue, or fact to be ascertained, is a matter of fact to be determined by the jury (2 H Bl 205. Doug. 360. — It can never be proper therefore, to demur to evidence which is clearly relevant to the issue however weak it may be: and evidence is always relevant to any issue, which it conduces in any ~~way~~ degree, to prove. (2 H Bl 205 —

The demurrer puts an end to the question of fact & refers to the Court the application of the law to the facts shewn in evidence — It therefore admits the truth or existence of the facts shewn in evidence by the adverse party, & like other demurrers denies their sufficiency to support his issue — i.e. their legal operation in his favor (4 Bac 136. 2 Lon. 146 Co L 72. 2 H Bl 205-6 —

When the whole evidence exhibited is written, it may always be demurred to; & the party exhibiting it, must join in the demurrer or waive the evidence — for by the writing the evidence is made certain — Ex. where a deed is exhibited in evidence of a title, — a cove.t as evid.e of a debt (4 Bac 136. 5 Co 104. Cro. E. 751 — 2 Co L 72a. 3 Bl 372. 1 Rol 570. Bul. 313. Kirb. 106 —

Whether a party exhibiting parol evidence which is demurrable to, is bound to join in the demurrer, is a question not fully settled by the old authorities (4 Bac 136. 1 Lev 87. Co L. 72a. 5 Co 104 — (Cro E. 751 — 2 that he is not, because the evidence is uncertain 2 u.) (It may indeed always be pretended that the evidence is not truly stated) — But it is clearly settled that in such case the parties may agree to join in dem.r (Cro E. 752) — It is also settled that if one of the parties produces

= witnesses to prove any definite fact; the adverse party may, by admitting the fact itself on the record oblige the other to join in a demurrer to the evidence adduced to prove it, or to wave the evidence (Allen 18, 2 H. Bl 206 –

= And it seems now to be settled, that if parol evidence exhibited in support of the issue is "certain" (i.e. direct & explicit) the adverse party, by confessing it on the Record to be true, may compel the party producing it, to join in demurrer to it, or to wave it (2 H. Bl 206 –

If the evidence produced is loose & indeterminate, the adverse party cannot demur to it, without admitting it to be true; but by making such admission upon the record, he may demur to it whether it be written or parol (5 Co. 104. 2 H. Bl 207) & the party producing it must join or wave the evidence but he is not bound to join without such admission Bul. 313. –

If the evidence produced is circumstantial; the party demurring to it, must destinctly admit upon the record every fact & every conclusion, which it conduces to prove: i.e. every thing which the jury might infer from it – (He may then demur to it tho' parol –) otherwise it is not competent for him to demur; of course the adverse party is not obliged to join in the demurrer (Doug 114-127-9. 2 H Bl 207. 209. All 18. Bul 313. Str 22, 34) & Evidence conduces to prove every point to which it is relevant – vid. ante –

If the party demurring does not in the last case make the admission which the rule requires, & the

adverse party joins in the demurrer, the Court can give no judgt.; for the demurrer refers the truth & weight of the evidence, as well as its relevancy to the Court — a venire de novo must therefore be awarded (313. 4 Bac 137. 2 H. Bl 209 —

Our Supr. Court in 1787 decided that on demurrer to parol evidence before a single majestrate, the party producing it was not obliged to join: as a demurrer in such cases would tend to "entangle the proceedings" &c Kirby 352 — The same Court afterwards (in 1795) decided that the party offering the evidence was not obliged to join in a demurrer to it, tho' it was chiefly written & all agreed to (2 Swift 257 —

= The point in issue on a demurrer to evidence is whether the evidence demurred to is suff. in law to maintain the issue in fact? = Hence on such demurrer no advantage can be taken of any defect in the pleadings — But advantage may be afterwards taken of such defect, by motion in arrest of judgt. as after verdict (Doug 208. 213. Bul 313.) Que. as after genl. or special verdict? Can the Court presume facts omitted, proved, as after genl. verdict? —

Quere. Whether in Cont. advantage may not be taken of defects in the pleadings, on demurrer to evidence; as on issues in fact closed to the Court. especially, as in the last case our Courts on finding the issue in fact, immediately give judgt.: thus affording no opportunity to move in arrest (2 Swift 258. —

Que. Can this demurrer be taken, except to the evidence of that party, who takes the affirmative of the issue —

The party whose evidence is demurred to may always demand judgt. of the Court whether he ought to join

For if there be no colourable cause for demurring, the Court will not allow it, lest justice should be delayed on frivolous pretences, (4 Bac 136. Bul 314. All 18. 2 Rol R. 117. 2 H Bl 205 208. Lil Reg. 437 —

On demurrer to evidence & joinder, the usual course (in Eng.) is to discharge the jury immediately, & the writ of enquiry is executed afterwards. Tho' sometimes they assess the damages provisionally before the demurrer is determined (Bul 314. Cro C. 143. L Ray 60. Plow. 410. Sal 284. Doug 212 2 H. Bl 200 —
= In Conn.t there is no writ of enquiry — damages are assessed by the Court (1 Root 570. 2 Swi. 258 —)
The judg.t of Court in admitting improper testimony, is not a ground of demurrer — for a dem.r for that cause would not go to the whole; but to the interlocutory judg.t — Besides it would refer the question of law (if it could reach it) to the Court that had decided it — The proper remedy is a bill of Exceptions — Bul 314. Sal 284 —

If a party offering to demur to evidence is overruled, by the Court his remedy is by bill of Exceptions (4 Bac 136. 1 Ib. 326. 9 E 13. 1 Jon. 313. Cro E. 341. or 249.
" The Mode of demurring to Evid.e is for the party dem.g to state it upon the record, alleging that it is not suff.t in law to maintain the issue — & concluding by praying judg.t "that for want of suff.t matter in that behalf shewn in evid.e" the jury may be discharged from giving any verdict &c. & (if it be by Def.t) "that the Pl.ff may be barred &c. — (Bul 314. 2 H Bl 200. 2 Swi 256 —

Of Arrest of Judg^t. & Repleader

To arrest judg^t. is to stay or stop it – This is done on motion; reduced to writing, & entered on the record –

This proceeding is usually had only after an issue in fact tried, & a verdict found 3 Bl 386. 393 –

But this is not universally the case, for it may be had after a default (2 Bur 900) – or, after a demurrer to evid^ce. overruled Doug. 208. 213. –

In Eng. judg^t. is arrested for intrinsic causes only: i.e. such as appear on the face of the record: as when the declaration varies totally from the writ – Ex. one being in debt & other in case (3 Bl 393 – So when the verdict varies materially from the issue: For in such case the issue not being found either way: it is impossible to render judg^t. upon it: for the facts in question are not ascertained – Ex. slander for the words: "He is a bankrupt:" verd^t. finding the words, "He will be a bankrupt;" 3 Bl 393 – So if the declar^n. is wholly insuff^t. as if it discloses no cause of action; Pl^ff cannot have judg^t. tho' he may have obtained a verdict (3 Bl 393 –

And on the other hand, if the deft's plea on which he has obtained a verdict, discloses no legal defence to the action; judg^t. may be arrested by the Pl^ff (3 Bl 393. 6 Co E. 778.) Ex. not guilty plea-ded to an action of debt –

After verdict, judg^t. may be arrested for any cause which might be assigned after verdict & judg^t. for error (5 Com 174, 2 Vol 716 – 30, 45. Sal 77 –

It is a Genl. Rule that if the statement of the Pl^ff's title or cause of action, & that only, is defective, it is aided by verdict – Ex. a declaration in trespass does not lay a day certain – 3 Bl 394, Doug. 658, Plow. 202, Sal. 365, 5 Bac 317, Stra 1028 Bul 320 – 1. Cowp 825 – But if no title or cause of action, or a defective one is stated, it is not aided by verdict – Ex.

in Case, for cutting the Pff's ... (3 Bl 394, Doug. 658.)

The same distinction applies, *mutatis mutandis* to the defence pleaded by the deft.: Ex. Feoffm.t pleaded without averring livery of seisin, is cured by a verdict (1 T.Rep 145) = Secus in case stated ante of a plea of not guilty, to debt, for this is no defence nothing being either denied or avoided ~~that the~~ Pff has alleged (3 Bl. 395. Cro. El. 778) = See also as to the above distinction, 2 H Bl 201. Cro. El. 497. 4 T. Rep 472. Sal 365. Bul 320. 3 Burr 1728. 7 T. Rep 518. Cow. 389. 1 T. Rep 545. 1 Mod 292 —

It is an invariable Rule as laid down in the books — that any defect in the pleadings which ~~which~~ will support a motion in arrest of judg.t must be such as would have been fatal on gen. demurrer (3 Bl 393-4)

But the rule does not hold, è converso: that ev. matter will support a gen.l demurrer will support a motion in arrest of judg.t — for if the declaration be omit some particular circumstance without proving which, the party obtaining the verdict ought not to have obtained it, but which ~~that~~ is implied from those facts which ~~that~~ are alleged & found; the omission is cured by verdict, tho' it would have been fatal on gen.l demurrer — omitting to lay a demise ... in respect of ... livery, in case of a Ex. Feoffm.t pleaded, 3 Bl. 394, Cait. 389. Cro J. 44 —

The principle in the above distinctions is, That after verdict, the Court will presume, that all facts, not alleged, which are necessarily implied, from those, which are alleged & found, were proved to the Jury on the trial — In other words, the Court presume in support of the verdict, every thing which in point of fact, is necessary to warrant the finding i.e. every thing which it was necessary to prove for the purpose of proving the issue (Doug. 658. 1 T. Rep 145. Bul 320 — 1 Cow 827. Stra. 1023. 2 Root 273 ——

Thus, when in trespass the Pltff. omits to lay a day certain; the Court after verdict for Pltff. will presume that the trespass was proved to have been committed before the suit was brought (3 Bl. 394. Cart. 130. 389. Sal. 130. 662. 5 Mod. 287. 5 Bac 317. 7 D. Rep 518. Lha. 212. Mod 292. 169. 1 D. Rep 545. ... 118. L Ray 810. 6 Bac. 497.) for otherwise the finding is not warranted in point of fact. Thus the verdict aids the declaration — tho' it would not have been good on demurrer —

So, if a feoffmt. is pleaded without an averr. of livery of seisin, & found; the Court will presume, that livery was proved on the trial: for it is a necessary part of every feoffmt. (1 D. Rep. 145. 5 Bac. 317. 10 Mod. 301. Hut. 54.)

So, if a grant of an advowson is pleaded without an averr. that it was by deed, & found by verdict, the Court will presume that a grant by deed is proved — as there can be no grant of this kind without deed. 5 Bac 317. Hut. 54.

Thus the verdict is said to ascertain the facts, which from the inaccuracy of the pleadings, did not before appear (3 Bl. 394. 1 Mod 292) —

On the other hand, nothing can be presumed to have been proved, except those facts which are alleged & found, & such as are neccessarily implied from them, (1 D. Rep 145.) A defective title, or ground of action cannot be aided (3 Bur 1728. 1 Bac 101. L Ray 810. 1 Vent. 17. 7 D. Rep 523.) —

As if the declaration is totally void of substance — Ex ante — of Slander for calling the Pltff. a Jew — from the facts stated nothing can be presumed suffict. to support an action — no manner of declaring could make the words actionable (3 Bl 394. 3 Bur 1728. Doug 658 —

= So, if any fact is omitted, which is essential to the right of action &c. & which is not inferable from those facts which are stated & found; it cannot be presumed to have been proved; of course the fault is not cured by the verd.t = (3 Bl. 395. 1 T. Rep 145. Sal. 365) — " Ex. In assumpt. or Cov.t broken, performance of a covenant precedent is not averred – in such case the decla.n is not aided: for the fact does not follow from those which are alleged & is not necessary to be proved to warrant the jury in finding those which are stated (Bul. 321. Doug 658, 4 Bac 16. 7 Co. 10.a 5 Com. 45, 1 T. Rep 645, 8 T. Rep 127-8. 7 T. Rep 125. 2 H. Bl 574, 2 Bur 900, 4 T. Rep 472, Bul 321 —

= So in Case for mischief done by a dog &c. if science in the deft. is not alleged – & for same reason (Doug. 658 Sal 662, 3 Sal 12 —

So if in an action against an indorser of a bill, if the Pltf omits to state a demand upon the acceptor & refusal; or if he omits to state notice to the deft. of the acceptor's refusal – there is the same reason – Doug 654

Besides the court cannot, on principle presume any fact omitted which in point of law merely is necessary to support the verdict = for such presumption cannot be raised but upon the idea that the jury are competent judges of law: But upon this supposition every defect would be cured by verdict. & indeed it would be improper even to make a question after verdict as to the sufficiency of the pleadings — Thus if in ass.t no consid.n is alleged, & the Pltf obtains a verdict – the omission is not cured. (1 Vent 27. 7 T. Rep 381. Kirb. 403. contra —

A motion in arrest of judg.t after a default operates exactly like a demurrer – Nothing is cured, for nothing can be presumed, their being nothing found (2 Bur. 900 —

In some cases judgt. will not be arrested for the greatest defects — & even tho' nothing is cured by the verdict — In such cases the rule is this: — If the verdict is in favor of the party who upon the whole record, appears entitled to judgt. — he shall have judgt. however faulty the plea on which the issue is taken, may be on his part. Ex. declaratn. — wholly insuff.t plea in bar frivolous — issue on the plea, found for deft. — Pltff cannot have the judgt. arrested. For the first defect is on his side; & a frivolous plea is a suff.t answer to such a declaration (Hob. 199. 56. 4 Bac 131. L Ray 1080-1. 8 Co 120. 133,) — So, if the declaration is good — plea in bar, & Repn. both frivolous. issue taken on the replication, & found for Pltff — he shall have judgt. — The replication is suff.t for the plea in bar. (Hob 56. 9 Co. 110. 3 Leo 242.) —

On the other hand, when judgt. in pursuance of the verdict is arrested; a judgt. against the party, for whom the verdict is found, may some times be rendered —

The Rule is — If the party against whom the issue is found, appears upon the whole record, entitled to judgt.; it must be rendered in his favor the verdict notwithstanding — (Authorities above) —

Ex. declaration wholly insuff.t — Plea in bar suff.t or insuff.t — issue on the plea found for the Pltff, judgt. in pursuance of the verdict arrested, & entered for the Deft. (Hob. 56. 199. 200. 8 Co. 120. 133. 1 Bur. 301-6 —

So, declaration good — plea in bar frivolous — issue taken on the Replication & found for the Deft.; still the Pltff must have judgt. (authorities supra. & Bur 301-6 —

If the issue on which the verdict is found, is immaterial & the Court cannot discover from the record, for whom judgt. ought to be rendered, a repleader is awarded, on judgt. being arrested — Ex — Declan. good — Plea in bar good — Pltff traverses an immaterial part, & has a verdict — judgt. arrested. & repleader awarded, that the Pltff may take issue on a material part of the Plea — For the verdict decided nothing

(3 Bl 395. 2 Vent 196. Sha 394. 4 Bac 126. Ray 458. L Ray 707 = 1 Bur 301-6 — Qu. Why is not judgt. rendered for the defts.? Does not the Pltff admit what he does not traverse? & if he does; is it not clear upon the whole record that the deft is entitled to judgt.? vid. Cowp 502. 504.) The rule seems to be intended to prevent a new trial for mis pleading —

Secus, if the plea in bar is wholly insuff., & the Pltff traverses a part of it (or the whole) & obtains a verdict — No repleader is awarded, & the Pltff has judgt. For it appears from the whole record, that no manner of joining issue could have availed the defts.; & a repleader is never awarded for a defect, which cannot be cured (1 Bur 301. 5 Com 156. 8 Co. 120a. 133b. Hob. 56. 199-200. 2 Swift 264. Sha 394. 4 Bur 2130 —

So, if the declaration is good — plea in bar insuff. — & Pltff takes issue upon it, & deft. has a verdict; judgt. in the defts. favor is arrested, & Pltff. has judgt. for he appears, on the whole record entitled to judgt. (4 Bac. 131. 316. Lenk. 102. 11 Co. 10. 5 Bac 286. Dy. 362. Sal 173. L Ray 924 —

On a repleader awarded the pleadings begin anew at that stage at which the first deviation from the rule of pleading occurred. Ex. Plea in bar suff. — Pltff traverses an immaterial part, & has a verdict — On repleader awarded, the Pltff is to take a new traverse or make a special replication (3 Bl 395. Sal 173. 216. 579. Ray. 458. 3 Keb. 664. 1 Mod. 2. Cowp 510. 4 Bac 126. Sal 579 — According to the two last authorities, if the decln. & plea are both ill, the parties begin de novo — Qu. how can this be? (1 Bur 301-6) — A repleader is never awarded for immateriality of issue, in favor of the party who tenders the issue (as it seems) Doug. 380. 1 H Bl 644. Cowp 501 — If the Jurors after finding a fact specially make a conclusion of their own; the Court is not bound

by such conclusion, but gives judg.t upon the facts found without regarding the conclusion. Ex. On a quest.n of seisin the jury find some particular facts, & conclude thus "& thus J.S. was siesed" (5 Bac 286. 11 Co. 10. Dy. 362. Hob. 53. 56 –

A repleader is never awarded after a demur.r (but only after issues in fact) for the parties have already put themselves on the judg.t of the Court (4 Bac 129. 5 Co 52. Pop 42 Latch 148. 6 Mod. 102 – Contra 3 Lev 20. 440 – but denied to be law since – & how can an issue in law looking thro' ugh the whole record be immaterial, or indecisive?

If a repleader is awarded, when it ought to be denied; or vice versa; it is error (4 Bac 126. Sal 579. 6 Mod 2 – Gleason & Cowles vs. Chester, Court of Errors. 1803 –

= There can be no repleader after a default or discontin.ce (4 Bac 129. Sal 579. 6 Mod. 3. Sal. 219. Comb. 323 –

At com. law repleaders were sometimes awarded before trial but not so since the Stat. of jeofails: but if the defect is clearly incurable, it seems it may be done (4 Bac 56. 126. 129. 1 Bac 90. 103 3 Keb. 664. 6 Mod. 2. 1 Swift 32. Cart. 371. ~~2 Lev 2. 6 Mod 162~~ 4 Leo 19 Skin. 570. Sal 579 –

A repleader is never awarded upon a writ of Error (4 Bac 129. 2 Saund. 319. 2 Leo 12. 6 Mod. 102 –

Judg.t is sometimes arrested for defects in the verdict – Ex. Jury finds only a part of the issue omitting something material (5 Bac 296. Cro E. 163. 3 Leon. 82. Hard. 166. 2 Ray 1521. Sha 844 1089. Co L. 227. Esp 421) & a venire de novo issues – So if in a special verdict the jury find only the evidence of a material fact, & not the fact itself there must be a venire de novo (1 Cas t 111 – But if the substance of the issue is found, it is suff. Co L. 227. 1 Vent. 27. 12 Mod. 5 –

If the verdict varies from the issue in substance; it is ill – & judg.t is regularly arrested – Ex. Jury find ~~some thing~~ something foreign to the issue instead of the issue (5 Bac 299. 2 Rol 707 49. 719. 2 Vent 151 –

But a verdict which finds the issue is not vitiated by finding more – Surplussage does not vitiate – Ex. Issue whether the Def.t has assets – Verdict assets beyond sea (5 Bac 297 – 9. 2 Rol 717. 4. Cro J. 407. 6 Co. 57 –

= In a civil case ^where there are two counts the one good & the other ill; & the jury find a gen^l. verdict & entire damages; judg^t. is arrested, for it is not known to the Court on which count the ~~verdict is given &~~ the damages are assessed, or how much in each (10 Co. 130. Bul 8. 2 Wils 377. 1 T Rep 508. 532, 1 Rol 577. Doug 362. 1 Bos & P 329, 331. 2 H Bl 318. 2 Bac 7. 1 Root 346. 433. Stra 1094. Cow E. 328, 788.) yet in this case the declara^n. would be good on demurrer, for that is suff^t. – It is the assess^t. of entire damages which, ~~which~~ prevents judg^t. for the Pltff (3 Bac 568. 1 Mod. 271) – Secus, if sev^l. damages are assessed, on the sev^l. counts, Pltff may release ~~those~~ assessed on the bad Count, & take judg^t. for the other vide. last authorities ante & R L 434 – Qu. Is a release necess^y.?
So tho' entire damages are assessed; yet, if no evidence was given on the bad count; the verdict may be amend^d. by the Court from the judges notes, so as to apply to the good count only (Doug. 362. Stra 513, 515, 1 Lev 134 –
= In Con^t. if the declaration (consisting of one Count only) lays two distinct causes of action, one suff^t. & the other not, & a gen^l. verdict ~~is given~~ & entire damages; judg^t. is arrested – Secus, as to diff^t. parts of one cause of action – Ex. ~~three~~ words, all spoken at once, or at diff^t. times. 1 Root 346, 433 –
When judg^t. is arrested, in the foregoing cases because the damages are entire; a venire facias de novo issue – i.e. there is another trial, but no repleader: the issue is supposed to be right Doug. 362. 8 T. Rep 564 –
In crim^l. prosecutions, if one count is good & the other bad, & a gen^l. verdict ag^st. the def^t.: judg^t. is not arrested: For the Court decides the punishment & will give judg^t. on the good count only (2 Burr. 985 – 2 Haw, 627. Sal 384. Doug. 733. L Ray 886 –
That circuity of action will be the consequence of rendering judg^t. for the Pltff is some times a good cause of arresting it (4 T. Rep 470) – Qu. Is this circumstance, in itself, the true cause of arresting judg^t.? Is it not merely a consideration which shews, ~~that~~ in law, ~~the~~ the Pltff has no right of action – Ex. If on Pltffs recovering, the deft. would of course, have a right to recover it back; it follows, that Pltff has no right
In Con^t. judg^t. is arrested for many extrinsic causes – Ex. corruption or misconduct, in the jury (Kirb 13. 133. 184) as asking the opinion of third persons, finding upon ^the cast of a die &c

(5 Bac 291. Stra 642,) So, for misbehaviour of the party towards the ~~truth~~ jury- tampering &c (5 Bac. 292. 1 Vent 125. Cod 227.

So if one of the jurors was interested in the suit or so related to the prevailing party, as would form a principal challenge (Kirb. 184.) Is this relation to be ascertained by the Com. law, or by our Stat.? (See the Stat. of Conn. 244. 3 Bl. 363) or too nearly related to the bail of the prevailg party (Kirb. 279-

So that a juror has before been an arbitrator in the cause, or atty &c - or has given an opinion in it &c. Kirb. 166-

It is a Genl. rule, respecting the incompetency of a juror, if it goes to his impartiality, & would be a good cause for a principal challenge; is in Conn. a ground for arresting judgt. (Kirb. 13. 133. 184-

But any incompetency, which raises no presumption of partiality, is not a cause for arresting judgt.- Ex. Want of freehold. Kirb. 184. Stat 249-

And tho' the incompetency does go to his impartiality; still if the party against whom the verdict is, knew the fact, in season for making a challenge, & omitted to do it; he is presumed to have waved the exception, & cannot take advantage of it by a motion in arrest of judgt. (2 Sw. 232 Kirb. 166-

So if one of the jurors has before tried the cause in a court below: For the party is presumed to know the fact; since it appears upon the record (2 Sw. 232, Kirb. 166-

A previous opinion, declared by a juror, upon a genl. principle of law involved in the issue, is no cause of arresting judgt., or even of challenge (Kirb. 426-

~~So if a previous opinion, declared by a juror, upon a genl. principle of law involved in the issue, is no cause of arresting judgt.~~

So if a previous opinion on the merits of the cause appears clearly not to have influenced the verdict. Ex. A juror's having expressed an opinion five years before, but declaring on examination that he had forgotten it (Kirb. 62. 2 Sw. 232- The Court on motion in arrest of judgt. can never go into the evidence on

which the verdict was found (Kirb. 61. 87. 142. 273. 277 2 Sw. 264 — It is said by Swift that on arrest of judgt. for misbehaviour of the jury, or parties, a repleader is awarded (2 Sw. 264) — But this is not law 1 Root 573 —

= In Eng. as in Conn. verdicts are set aside, & judgt. arrested for certain causes not appearing on the pleadings — Ex. misbehavior of the jurors, or parties; but the fact is entered on the Postea by the judge, so as to become part of the record (5 Bac 288, 291. 292. 2 Lev 205. Stra 642. Bunb. 51 —

The same thing has been done, however, in two cases upon affidavit. (5 Bac. 291. 1 Frem. 79. 2 Jon. 83) — A new trial is the usual remedy (5 Bac 250) —

On arrest of judgt., no costs are, regularly, allowed on either side, for the party, arresting judgt. might have demurred & prevented the expense of a trial. (Sal 579. 2 Vent 196. 1 Rep. 267 — Kirb. 89. 1 Root 69. 70. 572) So, if the motion in arrest is over-ruled, & the party moving, brings error, & prevails; he does not recover his costs below —

This rule does not apply to arrests of judgt. in Conn. for extrinsic causes; for in such case, there is a second trial, & regularly the whole costs follow the final event (Kir 417. 1 Root 572 —

Nor does it hold where the issue in fact is tried by the Court — for under the issue in fact, exception may be taken to the pleadings, as on demurrer —

In Conn. when an issue in fact is closed to the Court there can be, according to the usual practice, no motion in arrest: For the Court judges of the pleadings under the issue; & on finding the issue immediately give judgt. (2 Swift 264 —

In Eng. motions in arrest are made within the four first days of the next term, after trial. 3 Bl 395

In Conn. the motion is made on the verdict's being accepted; & must be reduced to writing, & del.d to the adverse party, or lodged with the Clerk, within 24 hours afterwards (exclusive of Sunday) & before the end of the term (Kirb 235. 1 Root 572 —

Of Pleas & Pleadings—

The order of pleadings for the Deft. is — 1st to the juris-diction of the Court — 2dly Abatement of the Writ if ~~it~~ defective — the causes of abatement are either apparent upon the record, or proceed from matter extraneous — When there is an issue in fact joined upon a plea of abatement the parties may close it to the Jury; but it is our usual practice to put such issues to the Court — Matters in abatement properly respect only the writ, & not the declaration — which if defective either in form or substance ought to be taken advantage of ~~only~~ on demurrer — which is the 3d step in pleading — Demurrers are either general or special — When the subject of the declaration is such as would not support an action tho' the Declaration be ever so cor-rectly drawn, the demurrer should be general — & a judgt. for the deft. upon such demurrer is a final & complete bar to any further suit for the same cause no declaration being supportable thereon — Another cause of a demurrer is, when the subject matter was in fact sufficient to support an action, but the Declaration is defective through the omission of some material allegation, without the inser-tion & proof of which no recovery could be had; as in

Of Pleas & Pleadings -

an action of Slander for calling a man a thief if the Declaration omit to state that the words were spoken falsely & maliciously, it would be bad on gen.l demurrer; but the fault being in the declaration & not in the subject matter, a judg.t for the deft. would be no bar to another action for the same words -

These cases of a general demurrer are distinguishable from each other; & they are both different from those ~~cases~~ defects which are the proper subjects of a Special Demurrer in this that when a general demurrer would prevail against the declaration, the Declaration would not be cured of its defect by a verdict, for a motion in arrest would be fatal the verdict notwithstanding: but all defects which would be the proper subjects of a special demurrer are cured by verdict - These are cases of defects in point of form only, as when a necessary allegation is defectively set out - Under a Special demurrer, however, advantage may be taken of defects which would be reached by a general one. A judg.t in favor of the deft. on special demurrer to a Declaration is no bar to another action for the same.

4thly. a fourth species of defence is a denial of the facts alledged termed the general issue -

Of Pleas & Pleadings

A 5th species of plea is of some matter in excuse, denominated a Plea in bar — this plea admits the facts alledged to be true but shews matter in excuse — To such Plea the Pl.ff will, in giving his answer or replication, consider whether to demur, take issue upon the facts alledged in the plea, or assign other matter in answer of the matter pleaded in excuse — & the same right appertains to both parties through the whole course of the pleadings untile they are closed —

After verdict the unsuccessful litigant whether Pl.ff or def.t may move in arrest of judg.t if any sufficient cause exists upon the record or has intervened upon the trial — Any defect in the declaration, or ground of action, which was such as would have been fatal upon gen.l Demurrer, may be taken advantage of in arrest — & if the judg.t be arrested for want of orig.l ground of action no new action can be sustained, but, if the motion in arrest prevails merely because of a deficiency in point of statement in the declaration, a new action may be brought — So too for defects in other parts of the pleadings as well as the declaration, ~~after~~ judg.t may be arrested, provided such defect would have been the proper subject of a gen.l demurrer — the consequence of an arrest for such defect in the subsequent pleadings, is ~~that~~ a repleader is awarded, which by the Eng. mode begins where the blunder intervened, but in Conn.t the practice is to begin de novo — The Eng. Courts arrest judg.t only for causes appearing of record; but in Conn.t judg.t may be arrested for many

extrinsick causes, such as misconduct of the jury, want of the requisite qualifications &c which in Eng. are causes for a new trial, but not of arrest.

The next step is a writ of Error - this must be founded upon the record wholly, & not upon any thing extrinsic - not only the ordinary record consisting of the declaration & pleadings to it, but the interlocutory decisions of the Court as the ~~acceptance~~ admission or rejection of witnesses, the opinions of the judge given in charge to the jury, may by means of bills of exception to such opinions, be made part of the record, & be made the foundation of a writ of error, such bills being first allowed by the Court & signed by the presiding judge - When the judgement of the Court below is reversed, the Pltff in the orig. l suit may immediately enter his Case for trial upon the merits in such upper Court, provided it be a Court for the trial of issues; if not the Case is remanded to the Court from whence it came - but this re-entry for trial, is only in such cases where the merits of the Case was not tried in the Court of errors; for if the merits were tried & found against the orig. l Pltff, by the Court of errors, he can not reenter his Case for trial for it would be an insult to the Court to tender them the same question a second time in the same Case - Slips which are matters of abatement only, are not the proper subject of a writ of error - Writs of error upon facts lie ~~only~~

never upon such facts as are brought in issue up-
-on the trial of the Case, but upon those which
were not disclosed to the Court, & through ignorance
of which the Court rendered judg.t as if the Court
give judg.t vs an Infant without a guardian's being
appointed - for in such case the Court upon proper
application by writ will reverse their own judg.t
without the necessity of going to a higher Court
which in all cases of error in law, must be done -

But if there be no legal slip of which the unfortunate
party can avail himself, & final judg.t be entered up agains
him; he is remediless unless he can get a New trial.
the causes of granting which are numerous - The
granting of a new trial vacates, it is said, the former
judg.t not however so, but what all the steps taken
under it both by the party & officer before the new
trial granted, are lawful - & it is in the power
of the Court when they grant a new trial to impose
terms upon the petitioner to secure the adverse party
against losing the advantage they have already
gained, in the event of the decision upon such new
trial being similar to the first -

After judg.t & Execution are finally obtained & no
resource by way of defence remains to the un-
fortunate litigant, he may be still vexed by
an undue use of the Execution, to relieve him-
self against which an Audita Querela is his remedy
which being properly issued is a stay of Ex.n untill the
merits of the complaint are decided - upon this writ bonds must be given

Of Pleas & Pleadings

Particulars upon the foregoing heads –

of abatement — 1st – Pleas to the jurisdiction according to the Eng. practice must be put in propria persona & not signed by an Atty – perhaps it is not very material which signs the plea in Con^t. the Deft. or ^his^ Atty In Eng. when a Cause is dismissed for want of jurisdiction in the Court, no cost is taxed – In Con^t. the Court make a distinction between cases dismissed by the Court, ex officio, & those which are dismissed on plea, allowing costs in the latter case, but none in the former – But if the Pltff knowingly brought his action before a Court who had no jurisdiction, he would in Con^t. be liable to treble damages upon our Stat. against vexatious Lawsuits – but if it was not done intentionally to vex, but through real ignorance it would not be within the Stat., an action on the Case would however lie for the damage sustained —

2dly Abatement is the next species of plea; the causes of which are numerous – as firstly – in Eng. & in some of the American States, tho' not in this, ^the^ Outlawry of the Pltff is a cause of abatement; an Outlaw not being permitted to maintain any action – Secondly Excommunication is in Eng. (tho' not in America) a disqualification to prosecute an action, & of course is cause of abatement – Thirdly Alienage – In Eng. no alien being allowed to hold real estate within the realm no such person whether friend or enemy can maintain a real action – Personal actions, alien friends may

Co. L. 128
Ray 282.

maintain — In Conn.^t the law seems not thoroughly settled relative to the rights of aliens, but probably it is similar to that of England — Fourthly Popish recusancy is cause of abatement in Eng. but not here — Fifthly — It is cause of Abatement that the Deft is privileged as to time, or place; as all are privileged on Sunday — & members of Assembly &c are privileged from arrest during the session &c — A Sixth Cause of Abatement is misnomer either of the person or place of abode — When the Deft. takes advantage of a mistake of this kind, his plea must point out how the Pltff ought to have described him so as to enable him to make a good writ — Deft. is not obliged to take advantage of such defect for his safety — for if he suffer judg.^t to go against him & be satisfied by a wrong name, he may plead such judg.^t in bar of an action against him by his true name, making the proper averments in his plea — & indeed if he make no appearance & judg.^t & Ex.^n go against him by a wrong name, it should seem that the Ex.^n could not safely be levied, it purporting to be against a different person — Another cause of abatement at com. law, was where one of several Plaintiffs happened to die pending the suit or of the defts. when there were more than one: but now by Stat. of Wm 3.^d in Eng., & by a similar Stat. in Conn.^t the surviving Pltff may proceed with the suit after getting the fact of the death of his co-pltff entered on the record & of his being the surviving Pltff — & if one of the Defts in such case dies the Pltff has only to cause his death

Of Abatement—

Stra. 810

Of abatement — to be suggested upon the record in order to proceed with the suit — this in personal actions —
But in real actions it is fatal to the writ if either of the parties die, if the rights of the others are in any way altered thereby — In Conn. however it was early determined that it is not necessary for joint ~~tenants~~, tenants in common or coparceners to join in bringing a suit for real estate, but each one has a right to sue seperately for his share —
When there is but one Pltff or Deft. & he dies pending the suit the writ at com. law of course abated, but by an Eng. Stat. which has been substantially copied in all the American States if the Exr. of the Pltff chose to carry it on, provided the action was such an one as ~~the~~ such Executor could have instituted, & the Defts. Executor could have been sued in — But if the action be such as could not have been originated by ~~the~~ an Executor, or maintained against an Exr. at least, if the cause of action were such, it must in either case abate — But when the form of action only, was such as can not be maintained against an Exr. but the cause such as he might be sued for, perhaps there might be some doubt whether the ~~action~~ writ would abate, but most probably it would — The method of keeping alive such actions as may survive, is for the Exr. of the deceased Pltff to suggest the death of his ~~testator~~ upon the record & get his name entered as Exr. to carry on the suit But if the Exr. chooses to abandon the suit the Deft. cannot compel him to enter, for the Stat. contains no such provision, & the Deft. has no remedy for his cost —

Of abatement — But in case of the defts death, if the Pltff would proceed with the case, he must cite in the Exr. by Sci fa.

If a feme sole sues, & marries during the pendency of the suit, the process abates; but if a feme sole be sued & marries pending the suit, the process does not abate, but judgt. & Exn. may go against her alone, & be levied upon her notwithstanding her change of name, & upon such Exn. she may be taken & imprisoned as if she were sole — this is a solitary exception to that principal of law that a wife cannot be imprisoned upon civil process without her husband — If a married woman bring forward an action without her husb. & advantage be not taken of it in abatement, it cannot be done in bar — Another cause of abatement is that there is another action pending for the same cause & thing; & in such case the last brought action will abate — & it is not material that both the actions be of the same kind, provided they be properly adapted to the nature of the case; as if for the recovery of the value of a horse taken out of a field, the first action was trover, & the 2d. trespass, they both being proper actions the latter would abate — but if the injury complained of was shooting a horse, & trover be first brought, & then trespass, the latter action would not abate because of the pendency of the first, because trover is totally inapplicable to such a case —

If two proper writs for the same thing are dated the same day, both will abate, for in law there is no fractions of a day, & both writs would be considered as issuing eo instanti

Marginal notes: Sha. 811. — B. Rep. 1525 — 5 Co. 51 —

Of Pleas & Pleadings

Of Abatement

In England an action is considered to be pending as soon as the writ is served; our Courts consider them as pending from the return of the writ only so that if the Offr. will give up the writ & not return it, the second writ will not abate on account of the service of such prior one not returned the Offr. however, might be liable in damages to the Deft. for not returning the writ but such damages would be trifling — If a writ be not properly authenticated it will abate — In Cont. if the Statutory Duty be not properly certified — or if bonds be not taken when by Stat. they are required, or if the writ be not duly served, it will abate — & for the latter defect the plea must set forth how the pretended service was made — Scandalous or opprobrious language unnecessarily introduced into a Declaration is cause of abatement, so also the attacht. of an excessively ~~great~~ large quantity of property by direction in the writ has been, by our County Court adjudgd. to be cause of abatement —

A plea in Abatement must always be put in before any imparlance, i.e. any continuance or adjourn. of the Case except from day to day, except in a case where if judgt. should be rendered it would be erroneous in fact, as to render judgt. against a feme covert Deft. she being such at the commencement of the suit: in which case judgt. must be reversed; but in no other cases except errors in fact

Of abate-ment — errors in fact can a judgt. be reversed upon a writ of error for an abateable fault in a writ — Another exception ~~is when the~~ to the rule that pleas in abate-ment must be filed before an imparlance, is when the cause of abatement arises after an imparlance, as if the Pltff being a feme sole marry pending the suit, her marriage may be pleaded in abate-ment ~~the~~ the imparlance notwithstanding — It is not necessary that the plea be determined before imparlance, but only that it be filed — Our Stat. says that all pleas in abatement must be determined before the jury are impannelled; but necessity has imposed a construction upon this Stat. variant from the letter; the Courts only requiring the plea to be put in before the jury are ~~impannelled~~ dismissed — each Court however regulates its own rules relative to restricting the time of plead-ing in abatement to a shorter period —

At com. law as well as by our Stat., when the Pltff's writ is abated he may on paymt. of Cost amend not only such defects as the plea points out, but all other amendable defects — If however, he cannot make a good writ by stating facts truly, he cannot amend; for amendments must be such as will make a good writ & yet ~~might~~ be consistant with the truth of facts — By our new Stat. it is presum-ed the foregoing rule is no further altered than to give the court power to suffer amendments without payt. of Cost —

Of abatement — When a plea in abatement is over ruled the judgt. of the Court is that the Deft. answer over: in Cont. it is always such; but in Eng. & where the English rules are followed, if the pleadings in abatement terminate in an issue in fact, & that issue be closed to the jury who find for the Pltff the judgt. is in chief, & a jury is impannelled by the Sheriff to assess the damages, so that the merits of the Case are not tried at all —

In Cont. a varience in the declaration from the instrument declared on, is cause of abatement — This is perhaps peculiar to Cont. as the practice every where else, & what is most regular here, is to demur to the variance — Another cause of abatement is when the sum demanded is not due ~~at~~ untill a day posterior to the institution of the suit —

Of Demurrer —

A special demurrer points out the defects in point of form which are to be taken advantage of; but yet, under a special demurrer advantage may be taken of any defect in point of substance which is the proper subject of a general demurrer; ~~which~~ so that when it is difficult to determine whether the defect ~~was~~ is merely formal or whether it be a defect in substance, it is safest to demur specially for a general demurrer reaches defects in point of substance only —

Of Pleas & Pleadings—

By demurring the party admits the truth of what is regularly, pertinently & properly alledged; that is to say, ~~that~~ such allegations as are essential to the cause are admitted to be true; but not inessential matter; for ~~that~~ is not confessed by the demurrer nor any other matter which may be alledged but which the pleader had no right by the rules of law to prove: as if, for example, to an action on Note the Deft. should plead a parol agreement ~~that~~ the Note should be given up upon a certain condition, the performance whereof is set forth, the Pltff by demurring to such a plea, will not be taken to confess the truth of such an allegation, because this was not matter regularly pleaded, or in other words the plea made out no legal defence, such parol agreement ~~being~~ not being provable— but if the plea had been of such a condition in writing stating performance, a demurrer would admit the truth of the plea.

Pal. 561—

A demurrer in any stage of the pleadings, gives the party whose plea is demurred to, an opportunity of taking advantage of slips in point of substance which the party demurring has made in any former part of the pleadings, & which had been overlooked— for the demurrer strikes through all intermediate matter to the defect first made— As for example, if there be a bad declaration, to which the Deft. pleads a faulty

plea to which the Pltff demurs: the Deft. may defend his plea by shewing the defects of the declaration: & the judg.t in such case will be that the plea (however faulty) is sufficient. But in such case it must appear ~~that~~ the fault in the Declaration was such as would be the subject of a general demurrer only, for defects in form merely are cured, or rather waved, by being passed over — The form of the judg.t in the above case is given according to the Con.t mode, for in Eng. it would in such case be different, towit. ~~that~~ the declaration was insufficient. The same rule relative to the demurrer's reaching the first defect holds good through the whole Hob. 56. course of the pleadings notwithstanding the intermediate steps may be ever so correct.

The Deft may demur to one part of the Pltffs declaration & plead to the residue what plea he will but always observing to give an answer to the Co.L. 72. whole of the matters in the declaration contained.

The usual practice in such case is to try the demurrer first for if ~~that~~ is found against the Deft. nothing further need be done but to assess the damages Judg.t both on Gen.l & Special demurrers is in chief, & if against the Deft. he must move for a jury of enquiry to assess the damages – in Con.t however the Court always assess the damages in such cases. Both practices have their defects: for by the Eng. mode

the jury being under the direction of the Sheriff
only the admissibility, or inadmissibility of evidence
is by him decided upon, without the intervention
of the Court; while by our mode the assessment
of damages may in any case be drawn from
the jury (where the amt. of damages is the only question) by
demurring to the declaration — When the damages
are in themselves certain as in an action on bond
or note, the Clerk of the Court adjusts the damages
without the aid of either Court or jury; but if there
be paymt. claimed on such written instrument, in Eng.
the Clerk takes no notice of it, leaving the party to
his remedy by action or petition in Chan. as the
case may require; but in Cont. the Court try the
fact of paymt. upon such claim & assess the damages
according as they find the balance due —

Upon a demurrer in Eng. where a new point is
agitated & no precedents to be found the court after
breaking the case as it is termed, i.e. shewing their
2d Bur. 820 opinions, will allow the demurrer to be with-
1 Wils. 160 — drawn but in no other cases — In Cont. tho' no prac-
tice of the above nature has been adopted, yet the Courts
have allowed of the amendment of a declaration after
being adjudged bad on demurrer, & this has been sanctioned by
the Court of Errors — When the Pltff has exhibited all
his evidence the Deft. may after reciting the substan-
ce of it demur which demurrer the Pltff must join &
Co. L. 72 dismiss the jury, provided such evidence be all in writi-
5 Co. 104 ng, but not otherwise — A demurrer to Evidence has the same
2 Co. L. 143 — Co. L. 72 effect as finding a Special verdict by a jury, & may be the subject of a writ of Error

Of Pleas & Pleadings

Of Pleas in Bar

A plea in bar confesses the truth of the facts alledged in the declaration, but offers some matter in excuse not set forth in the declaration – All matters in excuse may be pleaded in bar, but the most of them may be, & generally are given in evidence under the genl. issue – Matters which are the peculiar province of a genl. issue as a flat denial of the facts alledged in the declaration, cannot be ~~given in evidence under the gen~~ pleaded in bar, & if it be, it would be bad in Cont. on demurrer. but in Eng. the mode is for the Court to order the plea altered to the genl. issue – The rules relating to a plea in bar are – 1stly The plea in bar, if the only defence, must go to the whole of the declaration,
Cro. E. 434, Mod. 250, Cro. J. 27. for if any part of the declaration be left unanswered it will be bad on demurrer – as for example, in case for assault & battery false imprisonmt. & wounding; the deft. pleads a warrant to take the Pltff. this is an answer to the ~~false~~ charge of false imprisonmt. but not to that of the wounding, & therefore bad on demurrer – 2dly A Plea in bar must not be
Hob. 95, Co. L. 303. Double; the meaning of this rule is that two distinct defences, & such as would require two answers, may not be combined in one & the same plea; as ex. gra. to an action on note the deft. may not plead full payt. & usury: unless by leave of the Court which by Stat. in Eng. the Courts are impowered to give –

Of Pleas & Pleadings—

Of pleas in bar— The deft. may plead as many matters as he will provided they all go to one point & require but

3 Bac. Abr. 176 — one answer— If there be two pleas & one of them be defectively pleaded, still it is double pleading— In case where one of the pleas is totally immaterial & frivolous, & would be so tho' ever so correctly set out, it is not in Conn. considered to be double pleading: this point is in Eng. doubtful there being

Bac. 186 — authorities both ways, the one cited in the margin is ~~that it would be~~ duplicity— If one of the things in the plea was of itself sufficient if plead as a defence but is not at all relied on as such, & only mentioned as matter of inducement, it is not double plead-ing, ex. gra. if the Pltff be a feme covert & the deft. instead of pleading that as a defence in abatement says in his bar, that altho' true it is he did give & execute the note on which &c, yet afterwards &c the the Pltff was married & that afterwards towit &c her husb. executed a release of sd. note; now here the coverture is mentioned only by way of inducement to shew the right of the husb. to ~~as~~ release the note, & is not deemed to be double

Mod. 25 — pleading— But the deft may plead more pleas than one if he seperate them & plead one plea to one distinct part of the declaration, & another to another, as a plea in bar to part & a pend. issue to

Co. 8 87 — a part, tender to a part &c— Where there are several defts. they may plead seperate & distinct & different pleas, as one full paymt., another usury &c —

Of Pleas & Pleadings

Of pleas in bar. Duplicity in pleading is always considered a formal defect & not a defect in substance & consequently can be taken advantage of only
1st Saun. 337. under a special demurrer —

3dly A plea in bar must be certain, i.e. it must not be too general — for example, if the plea be of a release, the plea must shew how the release was executed so that the Court may determine whether it be a legal one, ~~a not~~ that is to say such an one as the nature of the contract required

If the plea be of the performance of any con-
2d Co. 4 ditions it must shew how performed, & not make
1st Lev. 190 — the allegation generally — It is impossible to lay down any definite rules in this business but the nature & principles of the Case must be principally attended to & comparing it with adjudged Cases — In case of a plea in bar which states the defence defectively so that it would be bad on a special demurrer, if the Pltff instead of demurring, replies to the plea & thereby allows the allegations in it contained to be true, the defect is cured; as if the plea in bar be a release generally, in case where it should be in writing, to which Pltff replies ousting admitting the fact of the release but assigning some cause why he should not be concluded thereby; that defect in the plea is effectually cured; & if the replication is bad & Deft may demur without ever answering

his plea in bar, for the defect being matter of special demurrer only, it is cured by the repli-cation, & can not be taken advantage of in this way

Of Repli-cation. The Pltffs answer to a Plea in bar is stiled a Replication & it must be either a demurrer, a traverse or matter in excuse, & indeed so must all other subsequent parts of the pleadings — An issue of nul tiel record must not like other issues in fact, be closed to the Country, but always to the Court — The party whether Pltff or Deft. who traverses should never put himself upon the country immediately but must conclude with a verification, & wait for the other party to come over & contradict the traverse by reaffirming the matter traversed & that the other party ought to be concluded thereby, & so conclude to the Country on which the traverser closes the

Stra. 822 issue by adding the semilliter — there seems to be no good sense in this, for the matters alledged are not at all altered from what they would be if the issue was closed by the traverser's putting himself on the Country immediately, & in some particular cases, this, by way of exception, is allow-able, viz. when the whole matter in the bar is traver-sed, for then it is said, the traverse may conclude to the Country instead of with a verification — By Cond. practice if the parties consent, the traverse may conclude directly to the Country, but it must be expressed upon the Record to be by consent —

A Departure, which is always fatal on demurrer is where one alledges matter in excuse, which is

replied to, & in the rejoinder (if that be the stage of the pleadings) the Deft. sets forth some thing which does not atall fortify his plea; as for example, if to an action of Covenant for rent Deft. pleads performance generally, to which Pltff replies assigning a particular breach, to which Deft. rejoins that before the day &c he was ejected by the lessor
Co. L. 7 b. 1 Sid. 77. this being entirely new matter in excuse & not fortifying the bar is a departure — Whatever is left untraversed, unless answered by some other part of the plea, stands confessed — Any particular part of a Declaration may be traversed & the rest confessed as in an action of Ass't if notice be necessary & be alledged in the declaration, this single allegation may be traversed without giving any answer to the rest of the declaration which of course stands confessed, & then the issue is wholly confined to the point whether notice was given or not — The traverse must always be such as if proved will leave the Pltff no ground of action or it will be bad on demurrer; as in an action for stopping up three lights, traversing the fact of stopping up the three lights without adding "or either of them" would be bad, because if only one of them
1 Salk. 225. be stopped the action lies —

Regularly there can not be a traverse on a traverse but issue must be joined upon it — but yet there may be a traverse after a traverse in some cases, as ex. gra. in action of trespass for cutting trees alledged to be

done on the first of may, this however may be proved to have taken place at any time within three years of the commencement of the action whether before or after the day mentioned, to which if the Deft. plead a licence to cut trees on the first of May, & traverse all the rest of the time within the three years, the Pltff may by his replication traverse the licence so that there would be a traverse after a traverse –

If the Pltff traverse an immaterial part of the Defts. bar, ~~instead~~ the Deft. ought to demur, but if he does not but goes on & traverses the Replication, & ~~if~~ upon such immaterial issue the Jury find for the Deft., still ~~if~~ the plea in bar being bad & the declaration the only sound part of the pleadings, the Court on motion will give judgt. for the Pltff the verdict notwithstanding – But if the plea in bar was a good one, & an immaterial part of it traversed the ~~Court~~ ~~&~~ & that replication traversed, the Court would order a repleader because there was matter enough in the bar if the subsequent parts of the pleadings had been properly conducted –

Bur. 292 Stra. 994 –

A protestando is used when one in pleading admits a fact for the particular purpose of the matter then in issue, but denies it generally – & was formerly in use for the purpose of preventing the pleader's being concluded by the admission in some future issue or case –

Of Pleas & Pleadings

The verdict of the jury ought by our practice to be in the words of the issue; yet when there are many things traversed, the jury if they do not find them all need not mention all, for if there be enough found to give judgd. upon it is sufficient to make the verdict good— When the traverse is of an immaterial matter the jury may deviate from the issue & find the matter that is essential tho' not mentioned in the traverse —

Of New trials — The origin of these cannot now be traced in Eng. it is there a Com. law right — & in Cont. it was formerly so that the Genl. Assembly only could grant new trials; but now by Stat. adopting the Com. law modes the Courts are authorized to grant new trials. ~~but~~ the application always being made to the same Court before whom the former trial was had — By the Custom of the Eng. Courts the petition must be brought within four years after the first trial — by a recent Stat. the time, in Cont. is limited to three years — There are many causes for granting new trials. as 1st. the discovery of new & essential evidence. this cause is under these restrictions, ~~that~~ it must appear that the petitioner used due dilligence in the procurement of testimony, & that it was not through any negligence of his ~~that the~~ proof was not adduced upon the former trial — The

petitioner must state what the evidence is
which he expects to produce, & if such evidence
doesnot appear by the statement to be suffici-
-ent to entitle the petitioner to a new trial his an-
tagonist may demur; but if otherwise the
Sha. 273 Court hear ~~the~~ new offered evidence & decide with-
691 Prec. Ch. out the aid of a jury whether it be such as ought
194- to ~~be~~ intitle the petitioner to a new hearing—
2dly When a material witness was unexpectedly
absent, & that without any negligence on the
part of the petitioner: here too the evidence must
6 Mod. 22 be stated & the cause of the witness' absence, for
Salk. 546- merely stating him to be absent is not enough—
3dly ~~that~~ a witness improved ~~employed~~ by the adverse party
upon the former trial had been convicted of
an infamous offence— this however is a Cause
in Chan. only in Eng.; in Conn. no resolution has
been had upon this point— It should seem
B. ~~Cent.~~ that the rule to be reasonable ought to apply
1 32- Prec. Ch. to both Courts; but with this restriction that
194 Sal. the party complaining should shew himself to
653. have been ignorant of the fact of the witnesses
infamy at the time, or unable to make proof
of it by using dilligence—
102 1 Cent. 4thly That the triors were too nigh related to one
30- of the parties, unless the petitioner knew of it in season—
5thly That the verdict was against evidence: But
the Court will not grant a new trial merely

because they were of opinion that the bal. of evidence was against the verdict; but where the verdict had no evidence to support it, or comparitively with the counter proof, a mere trifle, a new trial will be granted; & yet when the verdict is equitable tho' entirely against evidence no new trial will be granted; & in case of vindictive actions a new trial
Stra. 1142 will be denied under such circumstances
Sal. 644 646 647 altho' there be some slight appearance of equity on the side of the petitioner, he being the orig.
Bur. 646. Plaintiff — 6thly For excessive damages — But there cases of this kind are to be found in the books; & ~~there~~ the rule is said to be that
2d Wils. 244 252. the damages must be outrageous at the first blush to induce an interference of ye Court.
7thly For the smallness of the damages; — this in vindictive actions is never a cause of
Stra. 940 1051 granting a new trial, but in matters of
Salk. & 647 — contract it is frequently done —
1. Str. 235 8thly Misconduct of the Jury, as drawing lots for
Cra. E. 189 the verdict, talking with others about the case &c. is
Stra. 642. cause for granting a new trial —
9thly For misconduct of the opposite party, as spiriting away a witness or any other fraudulent conduct affecting the trial —

10thly For the jury's disregarding the direction of the Court in bringing in a general verdict when directed to bring in a special one. This has never as yet been recognized as cause of a new trial in Connecticut —

NB. The law is ~~that~~ the jury must be unanimous in their verdict, but if they determine by a majority only, the Court will hear no evidence of that fact, so that the law tho' nominally as above stated is really ~~that~~ a majority of the jury may decide, but yet if any one of the jury stands out the others have no power to give a verdict nor to compel compliance — If a cause be lost through the negligence of an Atty the party for that cause can not have a new trial; but the party injured is left to his action against the Atty —

11th. That the verdict is against law: this is where there is no dispute about the facts, or it is evident the jury had no doubt upon that head, but founded their verdict wholly upon a mistaken notion about the Law — But yet in some cases of this kind, where the action is vindictive & the jury have manifestly done justice the Court will not grant a new trial notwithstanding the verdict be against Law — As in the Case where

Andw. ?3. one sued a Sheriff for hanging a man on his land & the fact was notorious, yet the jury acquitted the Deft. the Court refused a new trial, justice being done.

12thly That the judge has misdirected the jury or admitted improper testimony, tho in Eng. But there has never been a decision in Cont. warranting the conclusion that a new trial can be obtained because the Court have given an erronious opinion to the jury when sending them out to consider of a verdict—

No new trial will be granted in a qui tam action, except for fraud in the party as spiriting away the prosecutor's witnesses, it being in the nature of a penal ~~action~~ prosecution tho civil in its form— this restriction respects the pltff only— In a criminal prosecution if the person prosecuted is acquitted no new trial will be granted but if ~~acquitted~~ convicted he may have a new trial for cause—

Sha. 1238 899-

12th: Another cause for a new trial, is for misspleading, in which case the petition must state that the petitioner had a good defence which he must set forth, & ~~three sh~~ state also that he ~~has~~ omitted his true defence; & to this it is no answer that the petitioner was apprized of such defence for a party may have two defences & through error in judgmt. make choice of the wrong in the first instance; but if the first defence chosen be rest upon a point of law which has often been decided

the Court will not be so indulgent to the petitioner's ignorance as to grant him a new trial on account of his having made choice of such groundless defence, altho' there be a good defence which he might avail himself of upon a second trial — If the deft. sets up a defence which steers clear of the merits of the case & loses his cause by that means, no new trial will be granted him — Again, no new trial will be granted to enable the petitioner to make use of a legal defence when substantial justice has been done by the first decision —

Of Scire facias —

This is a process which always presupposes a former judgt. which gave birth to it; it is as much a judicial writ as an Exn. because it counts on a former judgt. — When any thing happens whereby the party cannot have the benefit of his Execution, even if through the fault of the party himself, as suffering his judgt. to lie too long, still a scire facias lies — it is signed by the Clerk of the Court where the judgt. is rendered usually, & returnable to the same: in some cases however it is not so, as ex. gra. if the judgt. be rendered by a Justice of Peace for fifteen dolls.

damage & five dol.^s cost, & a Scirefacias becomes necessary, here the Sci. fa. must be signed by the Clerk of the County Court & be made returnable to that Court, it being beyond the a Justice's jurisdiction—
The most capital cause for a Scirefacias is against an Executor or Adm.^r, to inforce a judg.^t against them de bonis propriis— as, for example. if one sues A. the Ex.^r of B. for a debt of B. & gets judg.^t, in the first instance the Ex.^n goes only against the goods of the testator in his hands, which if A. will not turn out, nor otherwise satisfy the Execution, the Cred.^r may have a Scirefacias against A. counting upon the former judg.^t & praying an Ex.^n against A. de bonis propriis. & a new judg.^t being obtained it goes against A. as for his own proper debt— It is a general rule that nothing can be pleaded against a Sci. fa. which might have been pleaded against the orig.^l suit, but that the defence must always be derived from something which

arose subsequently to the first judgt — By our Stat. a Scire facias may be sued out upon a bail bond instead of bringing Debt & in this the Stat. treats such recognizances as being in the nature of Statutes staple & such like confessions of indebtedness — The Sci. fa. if upon a recognizance in Supr. Court may be brought to that Court — It is a genl. rule that when the Sci. fa. is sued out against the same person against whom the first judgt. was, or his representative, no appeal lies — But if it be against one who was no party to the previous suit, nor is the representative of such party, an appeal lies upon the Sci. fa. The practice is not to attach upon a Sci. fa. but perhaps no good reason can be shewn against attaching upon this as well as other process —

Of Audita Querela — this is not a writ of common right & it is the duty of the judge who issues this writ to go into some kind of ex parte hearing by examination of witnesses or otherwise, so as to be satisfied whether

there be probable cause for such interferance, before he grants the writ — This writ is to be signed by the Chief Judge of the Court Court of Com. Pleas, unless he be incapable or out of the way when it may be signed by one of the other judges — This being a compleat supersedeas to the Execution, bonds amply sufficient to indemnify the party complained of must be taken, for to that security only can the Cred.r look, if the complaint in the Audita Querela be found to be groundless —

Of Mandamus — This is a writ issued by the Sup.r Court only — It lies for any one aggrieved to compel a lower Court, or any ministerial officer to do his duty — The party who moves the Court for a Mandamus must make oath to the truth of his allegations — The first writ is a command to the Court or Officer to do what is by the complainant alledged to be have been neglected or refused to be done, or to return a sufficient excuse for such neglect or refusal — If a sufficient excuse be returned nothing further is done; but if the return be insufficient in the opinion of the Court, a peremptory mandamus is awarded, a disobedien

of which will be deemed a contempt of the Court & be punished as such accordingly. But if the return be a false one, at com. law nothing further could be done upon that process, but the party injured was left to his remedy by action against the person making such return, in which he would recover exemplary damages - But by the Stat. of Ann. (the principles of which have been adopted by our Courts) the complainant is allowed to traverse the return, & the issue being found by verdict of a jury against the return, a peremtory mandamus is awarded; & in Eng. damages are at the same time assessed by the jury - no instance of the assessment of damages has taken place in Cont.

Of Habeas Corpus -

This is a writ of common right for any one imprisoned, under colour of authority or not, except it be upon Execution, or upon conviction of a crime - It issues from the Supr. Court directed to the person holding the complainant in custody, commanding him to bring up the body together with the cause of his detention specially set forth: & a non compliance

would be deemed to be a contempt of Court & punished as such — This writ will lie for a wife when confined by her husb., & when liberated, if the husb. again confine her he is punishable for a contempt — The same remedy lies for a Child, Serv.t &c unneces[s]arily confined by the parent or master — Any one who is imprisoned by legal process (except in the Cases mentioned above) even tho' for murder, has a right to this writ — & when brought up the judge or judges must decide on enquiry either to remand, discharge or bail him — When this writ issues in vacation it is triable by a single judge

Of Prohibition — A writ of prohibition is a writ which issues out of a Sup.r Court to prohibit further process in an action of which they have not jurisdiction but of which they are attempting to take cognizance: this writ to such inferior Court & to the party prosecuting — t is granted upon Petition of the Deft. in the Case before such inferior Court, stating the Cause of action & the incompetence of such court before whom he is required to appear, to decide s.d Cause

Of Pleas & Pleadings

If the inferior Court are convinced upon receiving the writ of Prohibition, that they have no legal power to proceed with the Case, they will attempt to go no further but dismiss the action; but if they think otherwise, they make a return to the Supr. Court of the action before them, which return will always be taken to be true, & the question is then argued before such Supr. Court, whether the inferior Court have jurisdiction or not – & if the Supr. Court are of opinion ~~that~~ they have not, then the judgt. is stet prohibitio; but if they are convinced ~~that~~ the Court below have jurisdiction of the Case they grant a writ of consultation, which is a permission for the Court below to proceed in the hearing & determination of the Cause

Of the Jurisdiction of Courts in Conn.

In the State of Conn.t there are several Courts for the trial of Causes at law & for the punishment of offences, with very different jurisdictions— to begin with the lowest—

The jurisdiction of a Justice of the peace extends to the trial of all civil ~~causes~~ causes which come before him as a Court of Law when the matter in demand does not exceed fifteen Dollars, except when the title of land is concerned, to the trial of which his jurisdiction does not extend— Securities & bills of credit witnessed by two witnesses are cognizable by him when the demand does not exceed thirty five dollars_ When a judg.t has been rendered by a justice who is dead or removed, an action of Debt on that judg.t is cognizable ~~to the~~ by a justice to the amount of thirty five dollars—

Whenever an Officer receives a writ or mean process or writ of Execution returnable to a justice & shall neglect to execute the same, or shall make a false return, for such neglect or misfeasance the Officer is suable before the Justice to whom such writ was returnable altho the demand exceed fifteen dollars— Justices are empowered to take confession of a Debt to

Of the Jurisdiction of Courts in Cont.

the amount of Seventy dol.s - & this is not to be understood with Costs inclusive — The judg.t of a justice is final in a suit brought on a security for money or bills of Credit witness-ed by two witnesses, & in which the matter in demand does not exceed thirty five dollars It is final in a suit for a sum within his juris-diction on a former judg.t of a justice, which sum may not exceed thirty five dollars.* or on an Officer's Rec.t for an Execution, pursuing the Statute mode of suit except where the judg.t on which the Execution issued was by confession of the debtor for more than thirty five dollars — In all other Cases within the jurisdiction of a justice where the sum demanded exceeds seven dollars there lies an appeal to the next County Court which appeal may be taken on a judg.t on pleas of abatement or on demurrer as well as on the merits of the case —

If the Deft. pleads title to an action of trespass before a justice, the justice can not try it, but must bind the Deft. in a bond not exceeding Seventy dol.s to pursue his plea & bring forward a suit for the trial of his title at the County Court next —

* "If the debt or damage recovered & due doth not exceed thirty five dol.s" says the Stat.

Of the Jurisdiction of Courts in Cont.

Justices have no cognizance of Equity, neither can they grant a newtrial — All actions before a justice must be brought in the town where one of the parties lives. When a justice renders judg.t for more than fifteen dollars including Cost, yet a scirefacias may be brought against the bail to recover the balance of the judg.t before the same justice — In all matters cognizable by a justice he has exclusive jurisdiction, except when an officer is sued for not executing, or making a false return of a writ returnable before a justice demanding more than fifteen dollars damages in which case the County Court have concurrent jurisdiction with the justice before whom such writ was made returnable ————

Of County Court Jurisdiction.

All actions except those mentioned & few more of a particular complexion in which the Sup.r Court have original jurisdiction, are cognizable by the Court of Common Pleas.

Of the Jurisdiction of Courts in Conn.t

All actions where the matter in demand does not exceed Seventy dollars, where the title of land does not come in question, & all actions on Bonds & Notes for the paym.t of Money only, & bills of Credit witnessed by two witnesses, unless when the Justices have exclusive jurisdiction, are heard & finally determined by the County Court — When ever an Officer is sued on a receipt for an Execution the judg.t of the Court of Common Pleas is final. In all actions of Account where Auditors have been appointed who have set & made their Report, the judg.t of the County Court is final; & the same rule obtains in Book Debt where Auditors have been appointed & have made their Report — So where the matter in dispute has been submitted to Arbitrators by rule of Court, the judg.t, on the return of the Arbitrators of their award, when made to this Court is final — So too a judg.t of this Court in an action brought on a Rec.t given by a third person for goods taken in Ex.n is final — This Court has exclusive jurisdiction of all matters in Equity up to 334 Doll.s — In all other matters cognizable by the Court of Com. Pleas, an appeal lies to the Sup.r Court —

Of the Jurisdiction of Courts in Conn—

The jurisdiction of the Supr Court is final in all cases which come before them by appeal ~~or otherwise~~ Whenever an action is brought against an Officer in the Supr Court for not executing a writ returnable to them or for making a false or undue return, the judgt is final — This Court has also an original & final jurisdiction whenever a scire facias is issued upon a judgt rendered by them — This Court hears & determines all writs of Error from the judgt of a justice of Peace & from the County Court — This Court has the exclusive jurisdiction of all cases in Equity from three hundred & thirty five Dollars up to Sixteen hundred pounds — Writs of Error may be brought from Decrees in Equity as well as judgts at law — It is the peculiar province of this Court to issue writs of Prohibition, mandamus & habeas Corpus

All issues joined upon any matter of fact in this, or the County Court must be tried by a jury unless, by agreement, the parties put themselves upon the Court for trial — Upon a default the Clerk of the Court makes up the damages ~~without the~~ intervention of a jury of enquiry

[illegible]

But if either party move the Court for a hearing in damages the Court will indulge them — so likewise upon demurrer judg^t. is rendered in chief; but if the parties request it the Court will hear them in damages — Upon the forfeiture of a bond the Court will chancer down the penalty to the principal Int^t. & Cost — So too upon a bond which may be broken at several different times, & a suit is brought for the first breach, the Court will render judg^t. for what is then equitably due, & will lodge the bond with the Clerk of the Court, & upon every subsequent breach the obligee may have a scire facias to cite in the obligor to shew cause if any there be, why judg^t. should not be rendered for the further breach — In Chancery the Court may enquire into the facts either by themselves or by a Committee —

Of the Sup^m Court of Errors —

This Court has no original jurisdiction but was constituted solely for the trial of writs of Error brought before them from the judg^ts. of the Sup^r. Court ———

Of Courts of Probate —

This State is divided into Districts in each of which is a Court of Probate consisting of One judge who has cognizance of the probate of Wills, granting administration, appointing guardians & acting in all testamentary matters — from this Court there lies an appeal to the Supr. Court —

The Genl. Assembly are also a Court for the purpose of trying suits brought against the State by petition of individuals craving relief — they are also a Court of Chan. for the trial of all matters in Equity which exceed sixteen hundred pounds — In these matters they have exclusive jurisdiction —

All these Courts have power to appoint their own Clerks, except justices of the Peace, who have none

[illegible]

[illegible]

(1)

Baron & Feme -

as it respects what advantages are derived to the Husband in regard to the Wife's property by marriage, whether real or personal - & what would be the consequence as it respects each in the event of the Wife's dying first, or the Husband first ———

By the Laws of England the Husband is upon marriage vested either absolutely or conditionally with the whole property - This discrimination in degree, arises from the different kinds of estate in possession of the Wife before Coverture; & also from the different exertion of the right of ownership vested by law in the Husband -

The first grand division of Property is into real & personal; the latter of which, will in the consideration of the proposed subject, necessarily be contemplated under three distinct heads - viz. Personal property in possession. Personal property in action, & Chattels real -

1st Of Personal property in possession - Over this species of property the Law gives the Husband an absolute and uncontroled authority immediately upon the commencement of the Coverture, & that without any concurrent act of his, for the possession of the Wife becomes by the marriage ceremony, to all intents the possession of the Husband - And the same silent operation of Law which so effectually vests a right in the Husband, does as effectually divest the Wife of all right to the property; neither has she any more control over that, than over any other property of the Husband, with the disposal of which the Law sternly prohibits her intermedling - Neither is the name of the Wife necessary to the Husband ~~in [illegible]~~ for the protection of the property enjoyed in her right, nor in recovering it when tortiously wrested from him - The Husband can not only dispose of any, or all such estate, at pleasure in his life time, but may ~~de~~ devise it away at his death; or if he die intestate it will go to his Executors & not to the Wife ~~or~~ or her representatives — This privilege of [illegible]

-sing in its full extent is the growth of modern days.
For in the reign of Henry 2d and several succeeding reigns
the power of devising was restrained to one third of the
personalty where there was a Wife & lineal descendants
or to a moiety in case of the default of either of these — the
other two thirds, or moiety going to the Wife, or the Wife
& children, as the case might be — But by impercepta-
ble degrees, too minute to be traced from the scanty record
of those early times; the power of devising was gradually
extended till it embraced ~~till it~~ the whole personalty
property in possession — But at what particular peri-
-od this right was first recognized as Law, is perhaps
not at this time determinable, neither is it import-
-ant that it should be, it is enough that we know that
such is now the Law — The same rules obtain respecting
any personal property which may come to the wife du-
-ring coverture, & even a bond given to a Feme Covert
~~[illegible]~~ which is but a Chose in action may be sued in
the name of the Husband only — — — —

2dly Personal Property in action — — —

To this species of property too, the Husband is unquestio-
-nably entitled, provided he exert that right of ownership
with which the Law invests him — for property in
action when once reduced to possession is as perfectly
in the power of the Husband & out of the power of
the Wife, as if it had been in actual possession at the
time of the marriage — & every right that is incident
to the Husband in the one case is incident to him in
the other — But in every process for the reduction of a
such Chose in action into possession, the Husband must
claim in right of his Wife & sue jointly with her —
But if the Husband neglect to profit by the advantage put
into his hands, of reducing those choses in action into possessio
during the joint lives of the Husband & Wife, he cannot
at death dispose of them by will, neither shall they go to his
Executor but to the Wife ~~or her representatives~~ by right
of survivor — But on the other hand, if the Wife die first, the
property ~~of the Wife does not~~ in action does not go to the
Husband but to the representatives of the Wife —

And this destination is agreeable to strict justice; for if when the Law is so indulgent to the Husband, he will not enable the Wife, by whom he becomes entitled to the property, to share in the enjoyment of it. it would be highly unreasonable to permit him after her death to enjoy it alone in prejudice to her representatives— But this injustice which the the common Law seems willing to prevent, is virtually is authorised by the Stat. of the 29th Ca. 2. which empowers the Husband as Administrator to the Wife, to appropriate her Choses in action to himself without liability to account to any representative— Holden, however, I apprehend, to the extent of such property, for the Debts of the Wife contracted before Coverture & not ~~dues~~ discharged during its continuance— Justice at least, sanctions the conclusion. & I believe, authorities support it— It is still a question whether that part of the Law respecting the rights of the Husband is operative in this State;- & the decision of the Question will depend ultimately, upon the determination of this point, viz. whether the Stat. of the 29th of Ca. 2. was in affirmance of the Common Law, or not?- For if not in affirmance of common Law, it is not binding in this State as no mere positive Statutes are which were enacted posterior to the reign of Henry 8th— This Stat. of the 29th of Ca. 2. was a repeal of so much of a Stat. of the 27th of the same prince's reign, directing the Administrator after discharging the accustomed legal demands, to distribute the residue of the Testator's estate to his legal representatives, instead of appropriating it to his own use, as had been the practice for many preceding ages— Which custom springing out of the rank soil of Ecclesiastical corruption. became so firmly rooted & of such antique growth. as to render it even at this day a doubt, whether such was the common Law, or whether it was an unjust practice in derogation of common Law— The latter opinion however seems the more probable, & consequently that the Stat. of the 29th of Ca. 2. was

positive & not a Declaratory Statute — or at most was but in affirmance of an old illegal practice — This is a conclusion, however, by no means unquestionable & and such are the doubts in which the ~~question~~ subject is involved, that it appears to me the reason of things is the principal ground upon which the conclusion rests — but it is to be lamented that in the investigation of the principles of the common law, reason does not always furnish an unerring ~~clu~~ clue to the truth of facts — Admitting then the common Law to be as above supposed, the Stat. of Ca. is of no force here, & consequently the Husband not entitled as administrator to the personal property of the wife

3dly Chattels Real ——— ———

Chattels real, comprehending all property of a permanent nature less than a freehold, vests in the Husband in as ample a manner as either of the others he having a perfect & sole right of using & disposing of it in any manner either with or with out the Wife's consent, except by devise, ~~so~~ by which he cannot dispose of it unless he survive the wife — A Chattel real in right of the Wife, being in this respect a joint tenancy, holden by the Husband & wife as joint tenants, ~~&~~ goes invariably to the survivor by the jus accrescendi, if not disposed of during the joint lives of the parties — The Husband having an undoubted right to make an entire disposal of the property — if he ~~aliene~~ lease it for any specific time ~~whi~~ tho' it be of a longer duration than his own life, still that lease is good against the wife's claim in the event of her being the survivor, till the expiration of the time for which the ~~ch~~ Chattel was aliened, be it ever so long — & after it will go to the Wife or her ~~deceased~~ representatives — So also if the Husband make a lease of the premises, to commence at a subsequent period, which period does not arrive till ~~after~~ after the death of the lessor & the vesting of the property in the Wife by the jus accrescendi

yet the Lease will be good, & the Lessee may enter by force of it at the time appointed by the lease, & in trupt the possession of the Wife to whom the property will against revert at the expiration of the lease —
If a Husband & Wife be possessed in right of the Wife of a term for years, be evicted, & the Husband bring a writ of Ejectment in ~~a~~ his own name only, and recover back the term, as by law he may, he becomes by this recovery ~~in~~ sole vested of the property & the right of survivor in the Wife is extinguished — thus does the Law, in this instance, in the very act of enforcing justice, operate the most palpable ~~of~~ injustice, & that without the shadow of a pretence — As the Laws of Connecticut do not recognize any such principle as that of joint tenancy, it may with propriety be questioned whether our law exactly compares with English, in respect to Chattels real — From the principle of rejecting the doctrine of joint tenancy, it is reasonable to conclude that Chattels real follow the same rule with Choses in action i.e. go to the Wife when she is the survivor, but when not, to her representatives — This is however, rather speculative than legal Logic —

Real Property — Real property is in contemplation of Law of more importance than personal & more ceremony attendant on the transfer of it —
In respect to this species of property the Law is more tenacious of the right of the Wife — whose title to the freehold, is in no instance extinguished by the marriage But her right of possession & usufruct is suspended during coverture & transferred to the Husband, who may ~~enjoy~~ improve or dispose of the same at pleasure, & is not responsible therefor — But the Husband cannot dispose of such property for any longer period than the joint lives of the Husband & Wife, without the wife's consent, & that ascertained in a particular manner, viz by fine & recovery — Neither can the Husband enjoy the usufruct after the wife's death, excep

6 by the operation of the Curtesy ~~as the case may happen~~

This is a contingent right, depending upon the circumstance of the Wife's dying seised of an inheritable freehold, which might by possibility descend to her issue, the wife having had such issue born alive, by her then surviving Husband — in which case ~~the~~ he continues in possession of such estate as tenant by the Curtesy, during the term of his life, whether the ~~issue~~ issue survive the wife or not — ~~& in one other case the husband by the concurrence of a number of fortuitous circumstances may be entitled to hold during life the estate in right of his Wife. This is where the man marries a Wife who is Donee in frank marriage, & she dies leaving no issue who can inherit according to the terms of the gift as having left any the donor entitled, leaving the Husband who is in such case entitled to hold during life, & is in legal language stiled Tenant after possibility of issue extinct~~ 'Bating this ~~two~~ exceptions (~~the first of which is very extensive in its operations~~) the Estate in whatever hands, does immediately upon the death of the Wife, descend to her heirs — & any alienation for a longer period than the life of the Wife, except it be by fine & recovery, is immediately determined by that event — And in the event of the wife's surviving the Husband, the property becomes absolutely hers and hers solely — The Law of real property as it respects the right of the Wife, is in this State substantially the same as in England, but with some exceptions —

As to alienation — We have none of the solemn nonsense exhibited in the ceremony of a fine & recovery, but a Feme covert may here alien her property like other folks, by deed, her husband joining with her —

The tenancy by Curtesy too, is in this one point variant from the Eng. Law, viz. if the issue survives, the the husband is tenant of the freehold, only during the minority of the heirs — but if no issue survive then for life — This distinction rests upon the slight basis of a single decision of Court, but justice affords it a substan

-tial prop - The tenancy after possibility of issue ex-tinct is not known in this State, nor the absurd doctrine of Entailments whose offspring it is - Bating the above exceptions, the Laws of England & Connecticut respecting the realty, are the same -

2. Parent & Child, as respects the liability to support the Child, & the Child the Parent -

The mutual Obligation of Parents & Children to ~~support~~ relieve each others wants is a prime duty so strongly inculcated by the dictates of nature, that the interference of human laws should seem unnecessary - But least the clamorous principle of avarice should drown the small voice of Conscience - the Statute Law both of England & Connecticut has expressly provided, that lineal Relations to the degree of Grand parent ascending, & grand Child descending shall, (if of sufficient ability) support their respective relations, within those degrees, in the event of their becoming paupers - Proximity of Blood is to be regarded in imposing this obligation; so that a father is liable before the Grand father, & a Son before the Grand Son - In the event of the Parents becoming a pauper, where there are a number of sons of unequal property; each one will be directed to contribute according to his ability - But when the Estates of the Brothers are equal but the annual savings unequal, the Court who are the sole arbiters in this business, will ~~have~~ be in some measure governed by the comparative ability of each in this respect, when awarding the several apportionments - But ceteris paribus, the Court will, as justice requires, take notice of the inequality of fortune which Sons may have received from their parents - When there is a very great disparity of property, however, this consideration is of little moment. It has been determined that Sons in law are not compellable to support their Wifes parents - The reason assigned for this is - that it would tend to excite the spleen & ill humor of Husbands so predicamented, against their ~~Wi~~ Wives - & therefore that it is better that the Parent ho...

deserving should become a pauper, than that the brutality of such Husbands should be provoked. ~~as are~~ ~~wh~~ influenced neither by the moral tie, ~~not~~ nor a sense of decorum — This is too timid a principle to govern Legislators, & too inequitable to recieve the sanction of a Court of justice — As a consequence of the last mentioned principle, Daughters during Coverture are not holden to support their parents, unless they have a seperate maintenance; but before the commencement & after the determination of the Coverture they are liable in common with the Sons —

According to English principles if a man marry a Widow who is a pauper, he is not obliged to maintain her Children — Neither if the wife & Children have a competency of their own — But if he marry a widow capable of supporting her Children, the Law will not allow him to render them paupers by taking to himself their support, but will compell him to support them — The rule then is, that if the Wife could not have maintained them the Husband is not obliged to, but if she could, the Husband is bound for their support —

This obligation of maintenance determines with the Coverture — Whether such is the law in this State respecting fathers in law is doubtful, there having never been a decision of the point, & no express Stat. about it — But the practice has been invariably that the father in law should maintain his wife's Children. And I apprehend that a practice so obviously reasonable will not at this day be exchanged for the subtil refinements of Legal injustice —

Master & Servant — As it respects the Liability of Servants to their Masters for misconduct —

The Law respecting the liability of Servants to their Masters, is simple & unimbarrassed in principle, & demands but few observations — The Servant is liable to his Master for gross negligence, inattention & fraud, where the business of his charge suffers any detriment —

But for losses which ordinary diligence could not 9
prevent, the Servant is not responsible — faithfulness
being all that the law requires of him — If the Servant
be guilty of an infraction of a public law, while in the
Masters service, ~~for~~ which subjects the Master ~~is liable~~ to a penal
-ty — the Servant will be liable over to the Master,
provided he did it without direction — & that even if he
meant to advance his Masters interest — But if the
Servant be entrusted with Master's money, to carry
& be robbed on the way he is not liable; he not being
responsible, like a common carrier for accidents
which he could not prevent —
At common Law, if a Servant feloniously took away
the property of his master, even tho it were the goods
of his especial charge, it was a capital offence — but if
he embezzled the goods delivered to him by his Master
to keep, or to carry — or if he ran away with them anim-
-mo furandi, it was a ~~big~~ breach of trust but no felony
unless ~~he used fraud~~ he obtained the trust with a fraud
-ulent intention — But the Statute of the 21st of Henry 8th
makes the embezzlement of the Masters property, to
the amount of 40s, a capital felony — Some subsequent
Statutes have altered & amend the Stat. of Henry — but
the offence of it still remains — It has been a question
whether the Statute of Henry is operative in this
State, it being uncertain at what period in that
princes reign the Statutes cease to be of force as law to us — ~~but~~
& it has rather appeared to be the opinion of the
Superior Court, that we are to be guided in this point
by the common Law — A casuist might well
question the propriety of the distinction established
-ed at common Law, between Embezzlement
and Theft —

Contracts as it respects Innkeepers —
Every one who takes upon himself the business & duty
of an Innkeeper, whether he makes it known by a

public sign or by his practice, – puts himself under an implied obligation to receive & accommodate all who chose to become his guests – And if an Innkeeper refuses to receive a guest, (a reasonable compensation being tendered with the demand) he is responsible in damages to him, & is also guilty of an indictable offence – The fullness of his house may be pleaded in excuse, but will not screen him from a suit, if otherwise evasions of this kind would defeat the intent of the Law – It is even said that the refractory Innkeeper is compellable upon the spot, by the civil power, to receive & entertain the applicant – The justice or validity of such an arbitrary law, may with propriety of ~~such an arbit~~ be called in question in a Country like this, where equal liberty is the boast of all – Not only does the Innkeeper contract for the reception & entertainment of ~~his guest~~ all who request it, but also for the safe keeping of their property – & nothing will excuse his liability for its loss, – except it be by act of God or inevitable accident – For if they be lost by robbery or riot in a manner which no care could foresee or prevent, or by the stubbornness of the owner in refusing or neglecting to put them in such safe place as the Host shall direct (for it is his business to see that they are safe) the host is liable – So too say the authorities, if the host gives the key of the chamber door to the guest, & he carelessly leave the door unlocked, whereby the ~~do~~ goods are lost, still this does not purge the liability of the host If the guest neglect to give notice of his property, yet is the Innkeeper answerable for its loss – But if the guest be guilty of deception as to the value of the goods it seems doubtful whether the Innkeeper is liable – & if reason & justice are allowed a place in the premises, I ~~imagine~~ imagine the conclusion would be, that the Host should be liable only for as much property as he had reason to suppose there was from the representations of the guest — In like manner is the Innkeeper compellable to receive the horses &c or other cattle

of the traveller, into his stable & is liable for them 11
after reception, if stolen — But he is not compellable to receive into custody any mere dead matter which affords him no profit for keeping; unless the owner be with it — Neither will he be liable for its loss, if left in his possession any more than as naked bailee — Neither will the Host be liable for a horse being stolen out of his pasture, if put there by the owner's direction —
The Innkeeper is not bound to save harmless the person of his guest, neither is ~~will~~ he ~~be~~ responsible to him, for any theft committed upon his property by his own servant or comrade, while at the inn. Bating these exceptions the responsibility of the Innkeeper is entire, & neither absence sickness nor even lunacy, can be offered in excuse ~~for~~. & this last because it would be an infraction of an old legal ~~Maxim~~ Maxim, that no man shall be permitted to stultify himself — One of the most absurd of all Legal absurdities —
Amid all these severities the Innkeeper has some favor — The property of the guest while in his custody is not subject to the distress of the Lord of the manor — Nor does the entrance of an outward door, entitle an Officer in the execution of a civil process, to break an inward door — a privilege granted to the houses of Innkeepers over those of others — & that for a very obvious reason — The Law which ~~has~~ is so dictatorial respecting the duty of Innkeepers, is also liberal in the means with which it furnishes them for obtaining a compensation from their guests — For not only have they ~~the~~ remedies given to other creditors; but they have furthermore a lien upon the body & goods of their guests till they ~~sc~~ make them a suitable compensation — And in case of ~~neg~~ ... they have the right of reception upon fresh suit without having once voluntarily suffered their guest to ...

712 property to go out of their possession, they can-not afterwards have a lien upon either for the same due — If the horse come by fraud upon the owner, into possession of the Innkeeper as the horse of a guest, still will his lien upon him be good against the claim of the owner; for the host is not supposed to know the legal right of his guest to the property he has with him, but has a right to conclude that the ostensible is the legal proprietor — But if the horse be ever so long in the possession of the host, he may not use him, tho he has the lien — By custom of London however, the host may take the horse at appraisal to his own use, after he has eat out his value, tho it does not appear that he may dispose of him — It should be further observed that the Innkeeper cannot have a lien upon the body of his guest for the food of the horse — Such is a Sketch of the Law of contracts respecting Innkeepers — a law in many respects hard & inequitable, but perhaps [illegible] exceptionable upon the ground of public policy than of natural justice —